Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

THOMAS RYBICKI, FREDRIC GRAE,
GRAE, RYBICKI & PARTNERS, P.C.,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. § 1346 of Chapter 63 in the Federal Criminal Code, entitled "Mail Fraud," reads as follows:

> **§ 1346. Definition of "scheme or artifice to defraud"**
>
> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

The Questions Presented are:

1. Whether § 1346 is facially vague and invalid under the Fifth Amendment's Due Process Clause since, in criminalizing, without defining, a scheme to deprive another of "honest services," it (a) affords insufficient notice to defendants and the public, and (b) imposes insufficient constraint on prosecutors, and (c) gives insufficient guidance to judges.

2. Does the undefined language of § 1346 violate the constitutional doctrine of federalism by allowing prosecutors to apply federal fraud statutes to conduct that is sufficiently governed by state law and in which the federal government has no interest?

3. Whether § 1346 was unconstitutionally applied to attorneys who engaged independent adjusters to help settle personal injury claims with insurance companies where the government conceded that the claims were all settled for fair value and the companies suffered no financial loss — especially where state charges were already pending against the Petitioners.

4. Which is the proper test for evaluating the facial validity of a federal criminal statute whose vagueness implicates the Due Process Clause of the Fifth Amendment: (a) "when vagueness permeates the text of such a law, it is subject to facial attack" (*City of Chicago v. Morales*, 527 U.S. 41, 55 [1999]), or (b) "the challenger must establish that no set of circumstances exists under which the Act would be valid" (*United States v. Salerno*, 481 U.S. 739, 745 [1987])?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved in the Case	2
Statement of the Case	4
The *En Banc* Decisions of the Second Circuit	7
Reasons for Granting Certiorari	11
I. Prominent Circuit Court Judges Have, in Effect, Called Upon This Court to Grant Certiorari Because "It Is Quite Clear" That 18 U.S.C. § 1346 "Imposes Insufficient Constraint on Prosecutors, Gives Insufficient Guidance to Judges, and Affords Insufficient Notice to Defendants"	12
II. Because of its Vagueness and Lack of Any Standards, the "Circuits Are Fractured" on the Constitutional Application of § 1346	14
III. The Second Circuit's Extraordinary Decision to Invoke Its Rarely Used Powers of *En Banc* Review, and the Close Division Among the Circuit Judges, Support Certiorari in this Case	17

IV. The Recurring Unresolved Questions Generated by § 1346 Continue to Burden the Courts, as Evidenced by the Fact that this Court is Regularly Confronted with Petitions for Certiorari Directly Related to Ambiguities Resulting from the "Honest Services" Doctrine, Including a Pending Petition from the Seventh Circuit That Challenges § 1346 on Vagueness Grounds 21

V. The Undefined Language "Intangible Right of Honest Services" Allows Prosecutors to Apply Federal Fraud Statutes to a Wide Range of Conduct That Is Adequately Governed by State Law 23

VI. Section 1346 Drastically Undermines Fundamental Principles of Federalism by Allowing Encroachment on State Sovereignty and thus Radically Reducing State and Local Autonomy 25

CONCLUSION 28

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Allen v. United States,
164 U.S. 492 (1896) 6

Barnhart v. Thomas,
537 U.S. 1187 (2003) 18

City of Chicago v. Morales,
527 U.S. 41 (1999) 9, 20, 25

Cleveland v. United States,
531 U.S. 12 (2000) 25

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 18

Dickinson v. Petroleum Conversion Corp.,
338 U.S. 507 (1950) 19

Grutter v. Bollinger,
539 U.S. 306 (2003) 18

John Hancock Mutual Life Insurance Co. v. Bartels,
308 U.S. 180 (1939) 19

Kimel v. Florida Board of Regents,
528 U.S. 62 (2000) 25

Maggio v. Zeitz,
333 U.S. 56 (1948) 19

Massaro v. United States,
538 U.S. 500 (2003) 17

McNally v. United States,
483 U.S. 350 (1987) 8, 12

Mickens v. Taylor,
535 U.S. 162 (2002) 18

Miree v. DeKalb County,
433 U.S. 25 (1977) 18

Rinaldi v. United States,
434 U.S. 22 (1977). 18

Oil Chemical & Atomic Workers International Union v. Mobil Oil Corp.,
426 U.S. 407 (1976) 18

Scarborough v. United States,
431 U.S. 563 (1977) 19

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 5, 6

United States v. Brown,
79 F.3d 1550 (11th Cir. 1996) 23

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997),
cert. denied, 522 U.S. 1028 (1997) 12, 15, 16, 18, 20, 21

United States v. Czubinski,
106 F.3d 1069 (1st Cir. 1997) 24

United States v. Frost,
125 F.3d 346 (6th Cir. 1997),
cert. denied, 525 U.S. 810 (1998) 15, 16, 24

United States v. Gray,
96 F.3d 769 (5th Cir. 1996),
cert. denied, 520 U.S. 1129 (1997) 24

United States v. Handakas,
286 F.3d 92 (2d Cir. 2002),
cert. denied, 537 U.S. 894 (2002) 7, 12

United States v. Jain,
93 F.3d 436 (8th Cir. 1996),
cert. denied, 520 U.S. 1273 (1997) 14, 20, 24

United States v. Lopez,
514 U.S. 549 (1995) 25

United States v. Margiotta,
811 F.2d 46 (2d Cir. 1982) 19

United States v. Morrison,
529 U.S. 598 (2000) 25

United States v. Murphy,
323 F.3d 102 (3d Cir. 2003) 20

United States v. Rybicki,
287 F.3d 257 (2d Cir. 2002) 1, 6

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) 1, 2

United States v. Salerno,
481 U.S. 739 (1987) 19

Vermont Agency of Natural Res. v. Stevens,
529 U.S. 765 (2000) 25

People v. Wolf,
98 N.Y.2d 105, 732 N.Y.S.2d 644 (2002) 26

Other Authorities:

18 U.S.C. § 1341 3

18 U.S.C. § 1343 3

18 U.S.C. § 1346 ..... *passim*

28 U.S.C. § 1254(1) 2

John M. Walker Jr., *Second Circuit Survey*, 21 Quinnipiac L. Rev. 1 (Summer 2001) 18

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Petitioners Fredric Grae, Thomas Rybicki and Grae, Rybicki & Partners, P.C.,[1] respectfully request that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, sitting *en banc*, entered in this proceeding on December 29, 2003.

Opinions Below

1. A panel from the Second Circuit (Walker, C.J., Cabranes & Straub, JJ.) affirmed the Petitioners' convictions on April 22, 2002, in an opinion published at *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2002) and reprinted in the Appendix hereto at App. 81. That same day, the panel also issued an unpublished summary order addressing other issues raised by the Petitioners' appeal (App. 99).

2. On July 3, 2002, a majority of the active Judges of the Second Circuit voted to rehear the appeal *en banc* to consider "whether 18 U.S.C. § 1346 is unconstitutionally vague on its face." That order appears at App. 111.

3. The opinion of five Circuit Judges sitting *en banc*, upholding the constitutionality of 18 U.S.C. § 1346 and affirming the Petitioners' convictions, dated December 29, 2003, is published at *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), and reprinted at App. 1. The opinion of Circuit Judge Robert A. Katzmann, concurring in part of the majority's opinion, is published at 354 F.3d at 147 and reprinted at App. 43. The concurring opinion of Circuit Judge Reena Raggi appears at 354 F.3d at 148 and at App. 45.

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[1] Grae, Rybicki & Partners, P.C., has no parent or subsidiary companies.

4. Four Circuit Judges dissented and found that § 1346 is unconstitutionally vague on its face. The opinion of Circuit Judge Dennis Jacobs, joined by Chief Judge John M. Walker Jr., Circuit Judges José A. Cabranes and Barrington D. Parker Jr., dated December 29, 2003, is published at 354 F.3d at 155 and appears at App. 61. Chief Judge Walker and Circuit Judge Cabranes also filed a separate dissent, which is published at 354 F.3d at 165 and reprinted at App. 59.

5. On January 15, 2004, the *en banc* court granted the Petitioners' motion to stay the issuance of the court's mandates pending a Petition for a Writ of Certiorari in an order that is reproduced at App. 115.

Jurisdiction

The opinions and judgment of the Second Circuit sitting *en banc* were filed on December 29, 2003. The 90-day period for filing this Petition expires on Monday, March 29, 2004. *See* Rule 30.1. The jurisdiction of this Court to review the Second Circuit's judgment is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved in the Case

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The mail fraud statute, 18 U.S.C. § 1341, provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ... shall be fined under this title or imprisoned not more than 20 years, or both. ...

Similarly, the wire fraud statute, 18 U.S.C. § 1343, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. ...

18 U.S.C. § 1346, entitled "Definition of 'scheme or artifice to defraud,'" provides as follows:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Statement of the Case

The facts relevant to this Petition are, for the most part, undisputed and therefore can be introduced in a summary manner. Fredric Grae and Thomas Rybicki, two well-respected attorneys in Richmond County, New York, and former presidents of the Staten Island Trial Lawyers Association,[2] hired attorneys and a former insurance adjuster who were experienced in settling personal injury cases to facilitate the disposition of a large volume of outstanding claims by their clients pending with a number of insurance carriers. The claims were to be settled in good faith and without detriment to the insurance companies.

The government concedes that all claims were settled for fair value and no claim was inflated or settled out of turn (App. 5). Moreover, the Petitioners' clients received fair settlements and were not disadvantaged in any way. As it turned out, however, some of the independent adjusters had offered part of their fee to employees of the insurance companies as gratuities (App. 3, 73). The acceptance of gratuities violated the insurance companies' internal code of ethics, even though the employees' judgments were not influenced and the companies never sustained any loss (App. 73).

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[2] For nearly 30 years, these attorneys represented clients and the community with distinction and dedication. Thomas Rybicki was a director of the Richmond County Bar Association, and in 1984 the New York State Appellate Division designated him a member of the House of Delegates to the New York State Bar Association. His partner, Fredric Grae, a veteran of the United States Air Force, was president of the Richmond County Bar Association. In addition, Petitioner Grae served on the Joint Bar Grievance Committee for the Second and Eleventh Judicial Departments between 1980 and 1988. Second Circuit Appendix at 476, 552, 578.

In September of 1995, the Petitioners were charged in the New York State Supreme Court with engaging in a scheme to defraud in the first degree and a single count of commercial bribing in the first degree. In October of 1997, the state trial judge dismissed the Petitioners' charges of scheming to defraud because the proof before the grand jury was insufficient as a matter of law. *People v. Joseph Reynolds, et al.*, Ind. No. 8681/95 (Sup. Ct. N.Y. Co.).

The state prosecutor eventually became a member of the United States Attorney's Office in the Eastern District of New York and theorized that, even though the insurance companies had not suffered any loss, the Petitioners could be prosecuted in federal court, based upon the proposition that the companies had been deprived of the honest services of their employees who failed to report the gratuities they received from the independent adjusters.

Thus, in May of 1998, relying on the "honest services" thesis, the former state prosecutor obtained a federal indictment against the Petitioners under the contested auspices of 18 U.S.C. § 1346. As a consequence, the Petitioners went from a single state charge of commercial bribery to facing a *25-count* federal mail and wire fraud indictment.

The Petitioners were tried in the Eastern District of New York (Amon, J.).[3] The jury deliberated for three days and twice reported that it was hopelessly deadlocked. But, after being subjected to two *Allen* charges,[4] the jury convicted the Petitioners on June 16, 1999.

On January 5, 2000, the District Judge sentenced Fredric Grae and Thomas Rybicki to imprisonment of one year and one day and imposed a fine of $20,000 each. The law firm received three years' probation and a fine of $80,000.

On April 22, 2002, a panel of the Second Circuit, though acknowledging that because § 1346 "does not define honest services, the potential reach" of the statute is "virtually limitless" (App. 92),[5] nevertheless affirmed the Petitioners' convictions. *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2002) (Walker, C.J., Cabranes & Straub, JJ.).

In the meantime, another panel of the Second Circuit found § 1346 unconstitutional as applied to a private-sector defendant, such as these Petitioners, and emphasized

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[3] The District Court's subject matter jurisdiction was based upon the Petitioners having been tried for crimes allegedly arising under the laws of the United States.

[4] *Allen v. United States*, 164 U.S. 492 (1896).

[5] The court condemned the seemingly limitless scope of § 1346: "For example, a customer who importunes an employee to allow her to use the company's telephone access code to make an important long-distance telephone call, in the face of a written company policy expressly prohibiting non-employees from using the access code, could conceivably fall within the scope of the statute if read literally. So too could an employee's use of his company's letterhead to lend authority to a letter of complaint mailed to the employee's landlord in disregard of the company's code of conduct prohibiting the use of the company's letterhead for non-company business" (App. 92).

that "[i]f we were the first panel [in this Circuit] attempting to discern the meaning of the phrase 'honest services' in § 1346, we would likely find that part of the statute so vague as to be unconstitutional on its face." *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002), *cert. denied*, 537 U.S. 894 (2002).

On July 3, 2002, the Second Circuit granted the Petitioners' motion for rehearing *en banc* to consider whether § 1346 is unconstitutionally vague on its face (App. 111). Rehearing before the full complement of active judges took place on October 16, 2002.[6] More than 14 months later, on December 29, 2003, a deeply divided court produced *five* separate decisions, that totaled 96 pages, bearing on controversial aspects of § 1346.

The *En Banc* Decisions of the Second Circuit

Circuit Judge Robert D. Sack, joined by four other judges,[7] held that § 1346 is constitutional on its face and as applied to the Petitioners (App. 3).[8] Though agreeing that they would "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services,'" the majority looked to the "sparse legislative history" of § 1346 and case law from the

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[6] The National Association of Criminal Defense Lawyers, New York Association of Criminal Defense Lawyers, and New York Council of Defense Lawyers, participating as amici curiae, asserted that § 1346 is unconstitutional.

[7] The Honorable Guido Calabresi, Chester J. Straub, Rosemary S. Pooler and Sonia Sotomayor.

[8] The majority upheld the judgment in *Handakas*, finding that the statute was misapplied to that defendant, but overruled the "unnecessary constitutional ruling in that case without reviewing it on its merits" (App. 36).

various Circuits for guidance (App. 20-22). The court then considered "honest services fraud" decisions that preceded this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987),[9] and the enactment of § 1346 in 1988. The majority held that § 1346, "together with section 1341 or section 1343, provides explicit standards for those who seek to apply the statute, including federal prosecutors and courts, at least in the context of private-sector bribery cases such as this one" (App. 13-14).[10]

In a separate concurring opinion, Judge Raggi joined the majority in rejecting the vagueness challenge and affirming the judgments, but reached her conclusion through a different route (App. 45). Specifically, Judge Raggi relied on the language of § 1346 to sustain its

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[9] *McNally* found that the mail fraud statute does not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights." 483 U.S. at 358.

[10] Although Circuit Judge Katzmann concurred with part of the majority's opinion, he disagreed with the decision to address the facial vagueness challenge (App. 43-44). Judge Katzmann concluded that the "defendants did not present a facial challenge to § 1346 before either the District Court or the original panel" (App. 43). However, this finding was in error because that issue was the first question presented in the opening brief for Grae, Rybicki & Partners, P.C., before the original panel, in which the individual Petitioners joined. Thus, the facial validity of § 1346 was properly before the court and eligible for resolution.

validity (App. 45) and reasoned that the "common meanings" of the words employed in § 1346 are "well understood" (App. 53).[11]

A strong coalition consisting of Chief Judge Walker and Circuit Judges Jacobs, Cabranes and B. Parker[12] dissented and concluded that § 1346 is unconstitutional on its face (App. 64). The joint dissent written by Judge Jacobs reasoned, in part, that "there is no settled meaning to the phrase 'the intangible right of honest services' that is capable of providing constitutionally adequate notice" (App. 69). The dissent cautioned against the dangers of the "standardless sweep of the statute" (App. 72) and noted that there was "certainly no reason for these defendants to believe that the gratuities at issue — which the government never contended caused a loss — amounted to a federal mail or wire fraud violation" (App. 73 n.1).

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[11] Judge Raggi also contended that employing the broader standard of facial review contained in the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41, 55, 62 (1999) (Stevens, J.) (when vagueness permeates the text of a criminal law, it is subject to facial attack), "would mark a radical and unwarranted departure from the tradition of as-applied review" (App. 46).

[12] The Honorable Fred I. Parker participated in the rehearing *en banc* but died before the decisions were rendered (App. 1).

Furthermore, the dissenters meticulously cataloged the "wide disagreement among the Circuits as to the elements of the 'honest services' offense" and stressed that the Circuits are "fractured" on basic issues such as:

(1) The requisite *mens rea* to commit the crime;

(2) whether the defendant must cause actual tangible harm;

(3) the duty that must be breached;

(4) the source of that duty; and

(5) which body of law informs us of the statute's meaning (App. 73-76).

The dissent concluded that this "lack of coherence" results in a "truly extraordinary statute" whose substantive force varies in each Circuit (App. 76).

Finally, Chief Judge Walker and Circuit Judge Cabranes, who were part of the original panel that affirmed the Petitioners' convictions, dissented separately to "emphasize and explain" that the *en banc* review "free[d]" them from the restraints of the Circuit's existing precedent which compelled their prior decision affirming the convictions (App. 59). No longer bound by those restrictions, they dissented for the reasons "cogently stated by Judge Jacobs" (App. 60).

On January 15, 2004, the Second Circuit stayed the issuance of the mandates pending this Petition for Certiorari (App. 115).

Reasons for Granting Certiorari

The highly controversial 18 U.S.C. § 1346 has provoked a dramatic division among judges of the Second Circuit sitting *en banc* and, previously, produced a similar division among a full complement of the Fifth Circuit. In fact, this criminal statute, which greatly enlarges the scope of the federal fraud statutes, has been arraigned on charges of vagueness in virtually every Circuit. Judges throughout the country continue to point to the hazards that stem from the statute's uncertainty and limitless scope.

Moreover, as recognized by the dissent in the *en banc* proceeding in the Court of Appeals, the "*circuits are fractured*" on at least five basic issues regarding § 1346, and this "lack of coherence has created a truly extraordinary statute, in which the substantive force of the statute varie[s] in *each* judicial circuit" (App. 76) (emphasis supplied). The pressure of these conflicts and disagreements within and between the Circuits will continue to mount until resolved by this Court.

Thus, all of the concerns expressed by a significant constituency of our federal judiciary over the vagueness of § 1346, and the federalization of local conduct, have now been joined in this well-defined case that provides an ideal platform for resolving these issues.

I. Prominent Circuit Court Judges Have, in Effect, Called Upon This Court to Grant Certiorari Because "It Is Quite Clear" That 18 U.S.C. § 1346 "Imposes Insufficient Constraint on Prosecutors, Gives Insufficient Guidance to Judges, and Affords Insufficient Notice to Defendants"

In *McNally v. United States*, 483 U.S. 350, 360 (1987), this Court concluded that the loss or taking of "intangible rights" did not come within reach of the mail fraud statute, which is "limited in scope to protection of property rights." The Court continued that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* The Legislature then, in 1988, enacted 18 U.S.C. § 1346, which, without any standards or limitations, now criminalizes a "scheme or artifice to deprive another of the intangible right of honest services."

No conduct is specified in § 1346, which also does not identify what "honest services" may be. In fact, "[t]he plain meaning of 'honest services' in the text of § 1346 simply provides *no clue* to the public or the courts as to what conduct is prohibited under the statute" (App. 65) (emphasis supplied).[13] This phrase is "inherently undefined and ambiguous."[14] Furthermore, its expansive language fails to provide enforcement standards for

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[13] "The terms 'intangible right' and 'honest services' cannot be found in Black's Law Dictionary, the United States Code, or (for that matter) any federal statute other than § 1346." *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002). Ironically, "intangible" means "incapable of being defined or determined with certainty or precision: *vague*, elusive." *Webster's Third New International Dictionary* 1173 (1986) (emphasis supplied).

[14] *Handakas*, 286 F.3d at 101, quoting *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997) (Jolly, DeMoss & Smith, JJ., dissenting).

prosecutors or adequate notice of criminality to the public. Thus, this irredeemable vagueness permeates the entire text of § 1346 and renders it unconstitutional in all of its applications.

Nowhere is § 1346's ambiguity expressed more urgently than in the well reasoned and comprehensive dissent in this case, which functions as an exclamation for Certiorari. Here, even though a majority of the *en banc* panel upheld § 1346, Chief Judge Walker and Judges Jacobs, Cabranes and Parker convincingly argue that § 1346 is unconstitutional on its face because "it is quite clear that the statute imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants" (App. 64). As emphasized by the dissent,

> [a]lthough a number of circuits have upheld section 1346 against a claim of facial vagueness, there is now *wide disagreement among the circuits as to the elements of the "honest services" offense*. These opinions, taken together, refute rather than support the idea that section 1346 has any settled or ascertainable meaning or that the offense it describes has known contours (App. 73) (emphasis supplied).

The dissent authoritatively addresses many of the complaints that have been aimed at § 1346 since its inception. With extraordinary care, the Judges traced the tumultuous history of the provision, pointing out the chaos engendered by the many futile attempts of Circuit Courts to rationalize its vagueness (App. 76-78).[15]

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[15] The dissent incisively points out, with effective use of the rhetorical question, "How can the public be expected to know what the statute means when the judges and prosecutors themselves do

And any *ad hoc* definitions of "honest services" supplied by courts to salvage this flawed statute cannot satisfy the fair notice admonitions of the Due Process Clause. Thus, now is the time for this Court to consider the chronic question of whether Congress spoke clearly enough to meet the constitutional necessities of the Fifth Amendment. We urge that it did not.

II. Because of its Vagueness and Lack of Any Standards, the "Circuits Are Fractured" on the Constitutional Application of § 1346

Review by this Court is also essential because the law throughout the Circuits is *inconsistent* and in *utter disarray* concerning the constitutional application of § 1346. In light of the vagueness of the statute, questions relating to its implementation throng to this provision. And, in what we believe is an obvious call for review by this Court, the dissenters, as if drafting their own Petition for Certiorari, identify the crucial issues over which there are deep divisions among the Circuits (App. 76). Specifically, the Circuits are splintered on "whether the defendant must cause actual tangible harm" (App. 76). The Second Circuit does not require a specific intent to cause actual harm. However, the Eighth Circuit holds that the government must show that actual harm or injury was contemplated by the scheme to defraud. *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997).

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not know, or must make it up as they go along?" (App. 70). This compelling observation is made after courts, for over a decade, have tried in vain to nurse § 1346 back to health. In truth, this case presents the classic example of the "cure" being worse than the affliction. All attempts to diagnose the meaning of the vague words "to deprive another of the intangible right of honest services" have only ended in more uncertainty.

Some Circuits, including the Second Circuit, now hold that any misrepresentation must be "material" such that the "employee would have reason to believe that the information would lead a reasonable employer to change its business conduct" (App. 74). Other Circuits, such as the Sixth, require only a showing that it was "reasonably foreseeable" the victim would suffer economic harm. *See, e.g., United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998).[16]

The Circuits are also split as to "[w]hat *mens rea* must be proved by the government" (App. 73). Significantly, the Second Circuit holds that a defendant need only have intended to deprive another of the "intangible right of honest services" (App. 37-38). In stark contrast, the Seventh Circuit recognizes that an "intent to achieve personal gain" is an essential element of the offense. *See United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998).[17]

Another conflict arises as to what duty must be breached to violate § 1346 (App. 75). The Second Circuit now holds that it is the "duty owed by an employee to an employer, or by 'a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers'" (App. 3, 75). However, the Sixth Circuit requires the breach of a fiduciary duty, while the Fifth Circuit allows prosecutions only for the breach of an

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[16] The foreseeability conflict is the subject of a Petition currently pending in this Court from the Seventh Circuit. *See Scott Rise v. United States*, No. 03-1088.

[17] This conflict among the Circuits is fully developed in Judge Jacobs' dissent (App. 73-74).

employee's duty to an employer. *See Frost*, 125 F.3d at 366, 368; *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997).

Yet a further dispute concerns whether state or federal law is the "source of that duty" (App. 75). For example, the Sixth Circuit looks to federal law, while the Fifth Circuit focuses instead on state law. *Frost*, 125 F.3d at 366; *Brumley*, 116 F.3d at 735.

Finally, the Circuits are divided as to whether § 1346 revives pre-*McNally* case law (App. 75). The Second Circuit adopted an approach that divined the meaning of § 1346 "by analyzing cases overruled by *McNally* as a whole" (App. 22, 76). However, the Fifth Circuit recognized that "before *McNally* the doctrine of honest services was not a unified set of rules" and "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion." *Brumley*, 116 F.3d at 733-34. Thus, here there are two *en banc* decisions in direct conflict.

All of these divergent rules have been promulgated in an effort to make sense out of § 1346, which simply cannot be deciphered because of its incurable ambiguity. As a consequence, this case, more than any other, brings squarely into view the striking conflict among the Circuits and will enable the Court to decide the constitutionality of § 1346, as well as those questions that follow in its wake.

Ours is a legal system that honors constitutional processes and equal justice under the law for *all*. That necessarily means that if § 1346 is to remain part of the federal fraud weaponry, then its application must be uniform across the land.[18] However, the state of the law relating to § 1346, one of the most strife-ridden criminal statutes in the country, could not be more unsettled or in greater need of unification.

III. The Second Circuit's Extraordinary Decision to Invoke Its Rarely Used Powers of En Banc Review, and the Close Division Among the Circuit Judges, Support Certiorari in this Case

The Second Circuit's invocation of its extraordinary, and rarely used, powers of *en banc* review amplifies the importance of the questions concerning § 1346's vagueness. Significantly, as recognized by Chief Judge Walker, the Second Circuit decides *en banc* "only one

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[18] Consistency in the *implementation* of federal criminal statutes is essential to satisfy the mandates of the Equal Protection Clause. For example, only last year, this Court was confronted with a conflict among the Circuits concerning the procedural requirements for bringing a claim of ineffective assistance of counsel in a post-conviction proceeding. The Solicitor General vigorously resisted the Court's intervention, arguing that each Circuit should be allowed to formulate its own rules regarding the processing of ineffectiveness claims. But, in *Massaro v. United States*, 538 U.S. 500 (2003), the Court rejected that argument and resolved the conflict, adopting *one rule* for *one nation*. Here, the Court's intervention is even more desperately needed because of the broader application of these issues.

out of every 4,524 appeals filed."[19] This startling statistic lends enormous force to the issues presented by this case.[20]

Furthermore, rather than resolving the questions surrounding this statutory provision, the division among the Circuit Judges has effectively galvanized the controversy. In fact, this Court has considered the closeness of an *en banc* vote in reviewing the merits of a Petition for Certiorari.[21] Indeed, the Court has recently granted Certiorari in a number of cases where there were comparable divisions among the Circuit Judges.[22]

The collection of five opinions that stem from the Second Circuit's *en banc* hearing are, in effect, a window into the conflicting views throughout the various Circuits concerning the proper administration of

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[19] *See* John M. Walker Jr., *Second Circuit Survey*, 21 Quinnipiac L. Rev. 1, 5 (Summer 2001) (discussing the infrequency with which the Second Circuit grants *en banc* review). Review by the full Circuit Court is granted only to maintain uniformity of decisions or if the proceeding "*involves a question of exceptional importance.*" FRAP 35(a) (emphasis supplied).

[20] Recognizing the exceptional importance of issues implicated by § 1346, the Fifth Circuit has also gone *en banc*. *Brumley*, 116 F.3d 728 (5th Cir. 1997).

[21] *See* Robert L. Stern & Eugene Gressman *et al.*, *Supreme Court Practice* § 4.6 (BNA Books 8th ed. 2002), citing *Oil Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 412 (1976); *Miree v. DeKalb County*, 433 U.S. 25, 28 (1977); *Rinaldi v. United States*, 434 U.S. 22, 25 (1977).

[22] *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (Ninth Circuit split 7-4); *Barnhart v. Thomas*, 537 U.S. 1187 (2003) (Third Circuit divided 7-3); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (four judges of the Sixth Circuit dissented); *Mickens v. Taylor*, 535 U.S. 162 (2002) (Fourth Circuit split 7-3). This list is illustrative only and by no means exhaustive.

§ 1346. Moreover, one cannot ignore the grave misgivings previously expressed by other veteran judges of the Second Circuit, such as former Chief Judges Meskill, Newman, Oakes and Winter, over the application of the "honest services" doctrine and its high potential for abuse.[23]

Additionally, although internecine conflicts within a Circuit may be insufficient on their own to warrant review by this Court, where the inconsistency involves a highly volatile issue such as this one, which is of a recurring nature and accompanied by a widespread debate among the other Circuits, Certiorari is justified.[24] Here, there is no consensus among the Circuit Judges on issues of national import and broad application.

Furthermore, the Second Circuit and this Court need to reach an accord on the test to be applied in a facial challenge to a federal criminal statute. For example, Judge Sack employed the standards for facial invalidity set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987), considering, in a non-First Amendment context,

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[23] *See United States v. Margiotta*, 811 F.2d 46 (2d Cir. 1982)(Oakes, Meskill, Newman & Winter, JJ., dissenting from the denial of an earlier application for *en banc* review regarding honest services). These jurists were ineligible to sit on the recent *en banc* rehearing because of their senior status.

[24] *See John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (Certiorari granted because of a conflict within the Fifth Circuit and the importance of the question); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (limited grant of Certiorari because of an intra-circuit conflict resulting from precedent established "by a differently constituted court of the same Circuit"); *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (an intra-circuit split in the Ninth Circuit noted, as well as a conflict among the Circuits); *see also Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); *Supreme Court Practice* § 4.6.

whether "any set of circumstances exists under which the [statute in question] would be valid," and also addressed the test enunciated by the plurality in *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (Stevens, J.), which rejected *Salerno* and instead considers whether the law is "permeated" with vagueness (App. 10, 13). Judge Raggi, in contrast, wrote separately to reject any reliance on *Morales* and expressly relied exclusively on the stricter *Salerno* test (App. 45-46). Though finding § 1346 defective under *any* standard, the dissent embraced the *Morales* test (App. 62). A ruling concerning which is the proper test is essential to assure uniformity of judgments and to obtain "sound analysis of constitutional sufficiency" (App 62).

Finally, review by this Court is also supported by the sobering realization that § 1346 has faced charges of vagueness throughout the country because of its unsettling ambiguity and other disabling deficiencies.[25] There is no better time to engage these issues and to decisively resolve them.

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[25] The dissenting judges in the Second Circuit are not the only ones to recognize § 1346's serious failings. One prominent illustration is found in the *en banc* decision from the Fifth Circuit where three judges criticized the "general, undefined, vague and ambiguous words" of the statute. *Brumley*, 116 F.3d at 736 (5th Cir. 1997) (*en banc*) (Jolly, DeMoss & Smith, JJ., dissenting). *See also United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003) (the "plain language of § 1346 provides little guidance as to the conduct it prohibits" and "[d]eprivation of honest services is perforce an imprecise standard"); *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) ("[n]o one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing the mail fraud and wire fraud statutes along these lines"); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) ("[w]hen there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible 'rights' have been violated").

IV. The Recurring Unresolved Questions Generated by § 1346 Continue to Burden the Courts, as Evidenced by the Fact that this Court is Regularly Confronted with Petitions for Certiorari Directly Related to Ambiguities Resulting from the "Honest Services" Doctrine, Including a Pending Petition from the Seventh Circuit That Challenges § 1346 on Vagueness Grounds

This Court continues to be confronted with Petitions for Certiorari on a variety of issues attached to § 1346, including questions concerning its constitutionality, implementation and enforcement.[26] In fact, currently

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[26] *See, e.g., Nicholas Panarella Jr. v. United States*, No. 01-1736 (May 24, 2002) (questioning the scope of honest services fraud); *Peter N. Fernandez v. United States*, No. 02-209 (Aug. 2, 2002) (materiality element of honest services fraud); *George W. Tramell III v. United States*, No. 01-1400 (Mar. 20, 2002) (sentencing under the statute); *Michael C. Vinyard v. United States*, No. 01-1186 (Jan. 8, 2002) (questioning whether employees of private companies were intended to be covered by § 1346); *Frank Antico v. United States*, No. 01-1792 (June 3, 2001) (whether honest services of government officials is clearly defined); *Diana H. Johnson v. United States*, No. 00-1338 (Feb. 21, 2001) (whether application of the statute to a public official violates Due Process); *Albert Kenrick v. United States*, No. 00-471 (Sept. 25, 2000) (questioning the scope of § 1346); *Michael deVegter v. United States*, No. 99-1895 (May 25, 2000) (whether the statute is unconstitutionally vague as applied to a private citizen); *Vicki Lopez-Lukis v. United States*, No. 99-218 (Aug. 3, 1999) (questioning the jury instructions regarding the definition of honest services); *Jackie R. Mattison v. United States*, No. 99-141 (July 19, 1999)(jury charge regarding honest services); *Walter Frost v. United States*, No. 97-1549 (Mar. 16, 1998) (application of the honest services doctrine to a professor); *Jack Pribble v. United States*, No. 97-1146 (Jan. 9, 1998) (materiality in honest services fraud); *Michael B. Brumley v. United States*, No. 97-486 (Sept. 15, 1997) (whether § 1346 extends the wire fraud statute to criminalize misconduct by a state employee); *Ira Jackson v. United States*, No. 96-1835 (Mar. 25, 1997) (whether § 1346 is vague); *Robert W. Waymer v. United States*, No. 95-887, (Dec. 5, 1995) (does the statute deny public officials

pending before the Court is a Petition from the Seventh Circuit which raises the question of whether § 1346 is unconstitutionally vague as applied where the government relies on a breach of the state code of legal ethics as a basis for imposing criminal liability on a lawyer and a chiropractor who are not bound by the code. *See Scott Rise v. United States*, No. 03-1088.[27]

Clearly enacted criminal statutes and enforcement standards facilitate judicial review and minimize burdens imposed on the courts. Significantly, our appellate courts are constantly being called upon to evaluate issues such as whether a trial judge properly instructed the jurors on some aspect of the "honest services" doctrine. This is, in part, because judges cannot accurately charge juries on the elements of this offense when they themselves truly have no guidance as to what the statute really means. Review by this Court, at this time, will put to rest these ongoing debates.

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and other fiduciaries their Fifth Amendment right to Due Process). This list is illustrative only.

[27] The Solicitor General's response is due April 30, 2004.

V. The Undefined Language "Intangible Right of Honest Services" Allows Prosecutors to Apply Federal Fraud Statutes to a Wide Range of Conduct That Is Adequately Governed by State Law

The inherently undefined language of "intangible right of honest services" allows prosecutors to apply federal fraud statutes to a wide range of conduct that is not otherwise illegal in the private employment context or is governed by state law. This all-encompassing clause literally covers any deceptive conduct that even tangentially involves the mail or wires. Here, prosecutors were permitted, in effect, to create a federal offense from business transactions that were subject to strict regulation and prosecution under New York law.[28]

As the Eleventh Circuit emphasized, the "implications of allowing the federal fraud statutes to be treated by federal prosecutors as a largely unlimited device to attack wrongdoing whenever prosecutors feel wrongdoing exists are extremely worrisome." *United States v. Brown*, 79 F.3d 1550, 1562 n. 20 (11th Cir. 1996). The court went on to caution that a "limitless reading of the mail fraud statute could result in a kind of federal criminal common law, that is, a situation where a person could be convicted of a crime against the United States despite the conduct not violating an express statutory provision." 79 F.3d at 1556-57 (internal citations omitted). The Eleventh Circuit concluded that "the fraud statutes do not cover all behavior which strays from the ideal." 79 F.3d at 1562.

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[28] New York State's interest in regulating the conduct of an employee and an expediter is fully governed by its commercial bribing statutes (P.L. §§ 180.00 and 180.03).

The importance of this issue is enlarged tenfold by the realization that the "honest services" doctrine contained in § 1346 is rapidly becoming a heavily mobilized weapon in a federal prosecutor's armory.[29] Review by this Court is warranted because prosecutors throughout the country will continue to exploit § 1346 in an effort to criminalize conduct that no one would *ever* contemplate came within the ambit of the *federal* fraud statutes.

For example, employing the infinite reach of the "honest services" doctrine, mail or wire fraud charges were brought against university coaches in Texas in connection with obtaining academic eligibility for transfer students to play basketball; a psychologist in Missouri who received payments from a psychiatric hospital for referring patients to the hospital; professors in Tennessee who allowed students to submit plagiarized dissertations; and an IRS employee in Boston who looked up other people's tax returns for his own personal interest.[30]

Although the appellate courts eventually found that a few of those prosecutions were not, in fact, governed by § 1346, principles of Due Process do not permit the Legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be

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[29] In fact, § 1346 has been considered, in one fashion or another, in *more than 270 federal decisions*, since its relatively recent unveiling in 1988. Statistics obtained from research through WESTLAW's "ALLFEDS" database on March 26, 2004.

[30] *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996) (conviction reversed in part), *cert. denied*, 520 U.S. 1273 (1997); *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (conviction reversed in part), *cert. denied*, 525 U.S. 810 (1998); *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997) (conviction reversed).

set at large." *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (Stevens, Souter & Ginsberg, JJ.), quoting *United States v. Reese*, 92 U.S. 214, 221 (1876).

VI. Section 1346 Drastically Undermines Fundamental Principles of Federalism by Allowing Encroachment on State Sovereignty and thus Radically Reducing State and Local Autonomy

The undefined term "honest services" also empowers prosecutors to bring federal charges in areas historically reserved to the states, undermining fundamental principles of federalism by radically reducing state and local autonomy. The statutory language of § 1346 is of such a standardless sweep that it allows prosecutors to pursue their own personal predilections — as was done here.

This issue is particularly relevant in light of this Court's recent announcement that "[a]bsent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." *Cleveland v. United States*, 531 U.S. 12, 25-27 (2000).[31] Moreover, prosecutors are now armed with a statute that both the majority *and* the dissent concede "offers little assistance" in determining what conduct is proscribed (App. 20-21, 53, 65). There is sinister power in ambiguity. And that unchecked power has increased the range of § 1346 beyond anything ever contemplated by Congress. Fueled by

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[31] One also cannot avoid the strong admonitions recently issued in cases such as *United States v. Morrison*, 529 U.S. 598 (2000); *Vermont Agency of Natural Res. v. Stevens*, 529 U.S. 765 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995), which demonstrate a marked concern over inflaming the sensitive relationship between the states and the federal government.

the vague "honest services" language, prosecutors can push § 1346 far beyond the outer margins of federal jurisdiction and deep into the forbidden territory of the states.

Review is particularly warranted here, where the prosecution was first commenced in the state courts but was then smuggled into federal court under cover of the culpable language in § 1346. In fact, the dark ambiguity of the honest services doctrine enabled a federal prosecution that severely entrenched upon state sovereignty. And, in light of the alarm recently expressed by this Court concerning the overfederalization of state offenses, this issue standing alone should authorize a grant of Certiorari.

Finally, further consideration is justified since the application of § 1346 to the Petitioners is unconstitutional because of its flagrant intrusion on New York State's sovereignty. The conduct in question, involving unreported payments to insurance adjusters, is sufficiently regulated by New York law. The State had already initiated charges against Fredric Grae and Thomas Rybicki when a federal prosecutor preempted the state prosecution through the invocation of § 1346. By seeking a novel extension of mail fraud, the federal prosecutor has intruded into an area traditionally reserved to the states. And that encroachment involves an area of crime in which New York State has shown no need of assistance. *People v. Wolf*, 98 N.Y.2d 105, 732 N.Y.S.2d 644 (2002). In addition to the jurisdictional limitations imposed by the Constitution, there are practical reasons for limiting the prosecution of state crimes in federal courts. For example, federal prosecution of local crime depletes the already overextended resources of the federal government.

The import of this issue is further accentuated by the realization that in 2002 there were 1,586 mail fraud prosecutions in the District Courts — more than any other single criminal statute in the nation.[32] The fact that § 1346 now ranks among the criminal provisions most frequently utilized by prosecutors lends enormous weight to the questions presented by this Petition — and magnifies the need for uniformity in its enforcement.

For more than two decades, federal judges and Circuit Courts, aware of the risk that the intangible rights theory could exponentially expand federal criminal liability, have raised their voices against any further expansion of this dangerous doctrine. We urge that this is the case in which the line can be drawn and the troubling questions confronting § 1346 can be resolved.

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[32] Table 5.24, *Sourcebook of Criminal Justice Statistics Online, 2002*, U.S. Department of Justice, Bureau of Justice Statistics, Washington, D.C., available at *http://www.Albany.edu/sourcebook/1995/pdf/t524.pdf.*

Conclusion

For all the foregoing reasons, the Petitioners pray that a Writ of Certiorari issue to review the Second Circuit's opinion in this case.

Dated: New York, New York
March 29, 2004

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APPENDIX

TABLE OF CONTENTS

	Page
En Banc Opinion of the United States Court of Appeals for the Second Circuit, Dated December 29, 2003	A-1
Concurring Opinion of Circuit Judge Katzmann of the United States Court of Appeals for the Second Circuit, Dated December 29, 2003	A-43
Concurring Opinion of Circuit Judge Raggi of the United States Court of Appeals for the Second Circuit, Dated December 29, 2003	A-45
Dissenting Opinion of Chief Judge Walker and Circuit Judge Cabranes of the United States Court of Appeals for the Second Circuit, Dated December 29, 2003	A-59
Dissenting Opinion of Circuit Judge Jacobs, Joined by Chief Judge Walker and Circuit Judges Cabranes and Parker of the United States Court of Appeals for the Second Circuit, Dated December 29, 2003	A-61
Panel Decision of the United States Court of Appeals for the Second Circuit, Dated April 22, 2002	A-81
Summary Order of the United States Court of Appeals for the Second Circuit, Dated April 22, 2002	A-99

Order of the United States Court of Appeals
for the Second Circuit Granting Rehearing
En Banc, Dated July 3, 2002 ..... A-111

Order of the United States Court of Appeals for
the Second Circuit Granting Motion to Stay
the Issuance of the Mandates Pending a Petition
for a Writ of Certiorari, Dated January 15, 2004..... A-113

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2002

(Rehearing in banc: October 16, 2002
Decided: December 29, 2003)

Docket Nos. 00-1043, 00-1044, 00-1052, 00-1055

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

-v. -

THOMAS RYBICKI, FREDRIC GRAE, GRAE, RYBICKI & PARTNERS, P.C.,

Defendants-Appellants-Cross-Appellees.

Before: WALKER, *Chief Judge*, JACOBS, CALABRESI, CABRANES, F.I. PARKER,* STRAUB, POOLER, SACK, SOTOMAYOR, KATZMANN, B. D. PARKER, JR., and RAGGI, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York (Carol Bagley Amon, *Judge*). Sitting in banc, we conclude that 18 U.S.C. § 1346 — which provides that "[f]or the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services" — is not unconstitutionally vague.

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* The Honorable Fred I. Parker participated in the in banc oral argument of this appeal but died before this opinion was filed.

The defendants were therefore properly convicted of and sentenced for violating 18 U.S.C. §§ 1341, 1343, 1346 and 371 (conspiracy).

Affirmed.

Sack, J., filed an opinion in which Calabresi, Straub, Pooler, and Sotomayor, JJ., joined, and in which Katzmann, J., joined except for parts II. A and V. E thereof, as to which he filed a separate opinion. Raggi, J., filed an opinion concurring in the judgment.

Jacobs, J., filed a dissenting opinion in which Walker, C.J., and Cabranes and B. D. Parker, JJ., joined. Walker, C.J., and Cabranes, J., also filed an opinion concurring in the dissent.

BARBARA D. UNDERWOOD, Chief Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York; David C. James, Assistant United States Attorney, Daniel R. Alonso, Assistant United States Attorney, of counsel), Brooklyn, NY, *for Appellee-Cross-Appellant.*

HERALD PRICE FAHRINGER, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP (Erica T. Dubno, of counsel), New York, NY, for *Defendants-Appellants-Cross-Appellees Thomas Rybicki, Fredric Grae, and Grae, Rybicki & Partners, P.C.*

Barry E. Schulman, Brooklyn, NY, submitted a brief for Defendant-Appellant-Cross-Appellee Thomas Rybicki.

Ephraim Savitt, New York, NY, submitted a brief for Defendant-Appellant-Cross-Appellee Fredric Grae.

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ELLEN S. PODGOR, Georgia State University College of Law, Atlanta, GA (Joshua L. Dratel, New York, NY, of counsel) *for Amici Curiae National Association of Criminal Defense Lawyers and New York Association of Criminal Defense Lawyers.*

SACK, *Circuit Judge*:

We agreed to rehear this case in banc in order to consider whether 18 U.S.C. § 1346, which provides that "[f]or the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services," is unconstitutionally vague. Based upon a review of the case law extant at the time that Congress enacted section 1346, we conclude that the statute clearly prohibits a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer. Section 1346 is therefore not unconstitutionally vague as applied to the facts of this case, in which the defendants arranged for secret gratuities to be paid to claims adjusters employed by insurance companies against whom the defendants' clients asserted claims. Our analysis reveals that the statute's clear prohibition applies to a wide swath of behavior. We conclude that the statute is not unconstitutional on its face. Finally, we agree with the three-judge panel that first heard this appeal, *see United States v. Rybicki*, 287 F. 3d 257, 266-67

(2d Cir. 2002) ("*Rybicki*"), that during the course of the trial of this case in the United States District Court for the Eastern District of New York (Carol Bagley Amon, Judge), the jury was properly instructed on all of the elements of the crimes for which the defendants were convicted, and that a reasonable jury could have found on the evidence admitted at trial that the defendants had committed all the elements of those crimes. We therefore affirm the judgments of conviction and sentence of the district court.

BACKGROUND

The facts underlying this appeal are set forth in the opinion of the three-judge panel. *Rybicki*, 287 F. 3d at 259-61. We rehearse them here only insofar as we think it necessary to explain our resolution of this appeal.

Thomas Rybicki and Fredric Grae, two of the three Defendants-Appellants, are lawyers with offices in New York City's Borough of Richmond. Specializing in personal injury cases, they are members of the third Defendant-Appellant, the law firm of Grae, Rybicki & Partners, P.C. The defendants, acting through intermediaries, arranged for payments to be made to claims adjusters employed by insurance companies that had insured against injuries sustained by the defendants' clients. The payments, designed to induce the adjusters to expedite the settlement of the clients' claims, were typically computed as a percentage of the total settlement amount. Each of the insurance companies maintained a written policy that prohibited the adjusters from accepting any gifts or fees and required them to report the offer of any such gratuities. The payments were nonetheless accepted by the adjusters and, not surprisingly, not reported to their employers. Between 1991 and 1994, the defendants caused such payments to be made to adjusters in at least

twenty cases that settled for an aggregate of $3 million. The participants in the scheme, including Grae and Rybicki, took considerable steps to disguise and conceal the payments.

On June 3, 1998, the defendants were indicted for these actions. The superseding indictment charged the defendants with scheming to deprive the insurance companies of their intangible right of the honest services of their employees — the insurance adjusters — by the use of the mails and the wires, in violation of 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 371 (conspiracy). As explained in further detail below, the mail-and wire-fraud statutes criminalize the use of the mails and wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. § 1341 (mail-fraud statute); 18 U.S.C. § 1343 (wire-fraud statute). 18 U.S.C. § 1346 defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

At the outset of the defendants' eight-week trial, the government acknowledged that it would not seek to prove that the amount of any of the settlements connected with a payment to an adjuster had been inflated above what would have been a reasonable range for that settlement.[1]

The jury returned a verdict of guilty against each defendant on twenty counts of mail fraud, two counts of wire fraud, and one count of conspiracy to commit mail fraud. The defendants Grae and Rybicki were each sentenced by the district court to a term of imprisonment

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[1] Inasmuch as the defendants were prosecuted under sections 1341 and 1343 in combination with section 1346, we have no occasion to consider whether they would also have been prosecutable under sections 1341 or 1343, standing alone.

of one year and one day, three years of supervised release, a $20,000 fine, and a $1,150 special assessment. The district court stayed the defendants' surrender pending resolution of this appeal. The defendant Grae, Rybicki & Partners, P.C., was sentenced to three years' probation, an $80,000 fine, and a $4,600 special assessment.

On appeal, the defendants raised a host of legal and factual challenges to their convictions, most of which were disposed of by a summary order, *United States v. Rybicki*, Nos. 00-1043, 00-1055, 00-1044, 00-1052, 2002 WL 655214, 2002 U.S. App. LEXIS 7472 (2d Cir. Apr. 22, 2002), issued simultaneously with the published panel opinion. We confirm the resolution of those issues by the panel and do not revisit them here.

The published panel opinion, *Rybicki*, 287 F. 3d at 263, addressed the defendants' argument that section 1346's expansion of the definition of "scheme or artifice to defraud" to include a scheme or artifice to deprive another of "the intangible right of honest services" is unconstitutionally vague. The panel rejected the argument that the statute was unconstitutionally vague as applied, while concluding that the Court could not consider its asserted facial unconstitutionality because the challenge was not based on the statute's impact on the exercise of First Amendment rights, and that that is the only basis upon which a facial challenge can be mounted under Circuit case law. *Rybicki*, 287 F. 3d at 263-64. In evaluating the as-applied claim, the panel concluded that it was bound by this court's decisions in *United States v. Sancho*, 157 F. 3d 918 (2d Cir. 1998) (per curiam), *cert. denied*, 525 U.S. 1162 (1999), and *United States v. Middlemiss*, 217 F. 3d 112 (2d Cir. 2000), which upheld "convictions under § 1346 that involved schemes, like the one at issue here, in which the defendant breached or induced the breach of a duty owed by an employee or agent to his

employer or principal that was enforceable by an action at tort." *Rybicki*, 287 F. 3d at 264. The panel opinion concluded that the jury had been properly instructed on the elements of the crimes, and that the evidence supported such findings by the jury. *Id.* at 266-67. The panel therefore affirmed the defendants' convictions. *Id.* at 267.

The defendants petitioned for a rehearing in banc, which was granted. July 3, 2002, Order Granting Defendants' Petition for Rehearing in Banc, at 2.

DISCUSSION

I. *"Plain Error" Analysis*

Although defendant Rybicki objected to the vagueness of the language of the indictment when moving to dismiss, the defendants did not challenge the vagueness of the statute itself before the district court. We therefore review the court's failure to find the statute unconstitutional for "plain error." *See* Fed. R. Crim. P. 52(b).

> The framework of the analysis for plain error pursuant to Rule 52(b) is the four-pronged test set forth in *United States v. Olano*, 507 U.S. 725, 732 (1993). Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Thomas, 274 F. 3d 655, 667 (2d Cir. 2001) (in banc) (citations, internal quotation marks, and alterations omitted).

One of the criteria for determining "plain error" is thus whether there was error. We ultimately conclude that the district court committed no error, plain or otherwise, by failing to hold, unbidden, that section 1346 is unconstitutional. We therefore affirm on that issue without addressing the other "plain error" criteria. *Cf. United States v. Quintieri*, 306 F. 3d 1217, 1234 (2d Cir. 2002) (deciding that absence of error compelled conclusion that there was no plain error), *cert. denied*, 531 U.S. 899 (2003).

II. *The "Void-for-Vagueness" Doctrine*

A. Facial Invalidity

Our task is thus to determine whether the district court erred by failing to find section 1346 unconstitutionally vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Panel opinions of this Court have repeatedly held that when, as in the case before us, the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only "as applied," *i.e.*, "in light of the specific facts of the case at hand and not with regard to the statute's facial validity." *United States v. Nadi*, 996 F. 2d 548, 550 (2d Cir.), *cert. denied*, 510 U.S. 933 (1993). "[O]ne whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness." *Id.*; *accord Rybicki*, 287 F. 3d at 263 ("Where there is a vagueness challenge to a statute that does not involve First Amendment freedoms, the statute must be evaluated on an 'as applied' basis."); *United States v. Whittaker*, 999 F. 2d 38, 42 (2d Cir. 1993) ("Other than in the First Amendment context, vagueness challenges also must be examined in light of the facts of the case, on an as-applied

basis.") (citation and internal quotation marks omitted); *United States v. Jackson*, 968 F. 2d 158, 161 (2d Cir.) ("Vagueness challenges to statutes that do not involve First Amendment interests are examined in light of the facts of the case at hand."), *cert. denied*, 506 U.S. 1024 (1992); *United States v. Coonan*, 938 F. 2d 1553, 1562 (2d Cir. 1991) ("In the absence of first amendment considerations, vagueness challenges must be evaluated based on the particular application of the statute and not on the ground that the statute may conceivably be applied unconstitutionally to others in situations not before the Court.") (citation and internal quotation marks and brackets omitted), *cert. denied*, 503 U.S. 941 (1992); *United States v. McElroy*, 910 F. 2d 1016, 1021 (2d Cir. 1990) ("Vagueness challenges outside the context of the First Amendment are to be examined in light of the facts of the case, on an as-applied basis."). And in *Chapman v. United States*, 500 U.S. 453 (1991), relied upon by our *Nadi* panel for this proposition, 996 F. 2d at 550, the Supreme Court did indeed conclude that "First Amendment freedoms are not infringed by [the statute at issue], so the vagueness claim must be evaluated as the statute is applied. . . ." *Chapman*, 500 U.S. at 467; *accord Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis."). According to this line of cases, outside the First Amendment context, vagueness challenges will be considered only as applied.

The Supreme Court made essentially the same point in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), extending the "as applied" principle to cases raising facial challenges:

> [A]ssuming the enactment implicates no constitutionally protected conduct, [a court] should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. at 494-95. The Court reiterated this standard in *United States v. Salerno*, 481 U.S. 739 (1987), noting in dicta that a statute can be held facially unconstitutional even if the challenge is not raised under the First Amendment, but the test for facial unconstitutionality then is whether any

> set of circumstances exists under which the [statute in question] would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the Court] has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id. at 745.[2] In other words, where First Amendment overbreadth analysis is not available, a statute will be

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[2] By contrast, where First Amendment rights are at stake:

> The test we employ is familiar. Because conduct and not merely speech is involved, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. We will not topple a statute merely because we can conceive of a few impermissible applications. The possibility of a substantial number of realistic applications in contravention of the First Amendment, however, suffices to overturn a statute on its face. In this regard, it bears emphasizing that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial. Although the fact that a criminal prohibition is involved does

held unconstitutionally vague "on its face" only if it is unconstitutionally vague "as applied" to all circumstances.

Even among those cases in which consideration of facial vagueness challenges outside the First Amendment context is said to be possible, there is disagreement as to the nature of such review. The *Flipside/Salerno* approach was questioned by three members of the Court in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (opinion of Stevens, J.). There, even though First Amendment rights were not implicated, the Court struck down an anti-loitering statute as facially unconstitutional without first considering whether the statute was unconstitutionally vague as applied to the facts of the case or whether any set of circumstances existed in which the statute would be valid. The *Morales* plurality addressed the question whether and to what extent a facial challenge would be considered outside the First Amendment context thus:

> [I]t is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), and infringes

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not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth, it does appreciably shrink the amount of overbreadth we will find constitutionally tolerable, particularly when the penalty is severe.

Massachusetts v. Oakes, 491 U.S. 576, 595-96 (1989) (citations and internal quotation marks and punctuation omitted).

> on constitutionally protected rights, see *id.*, at 391. When vagueness permeates the text of such a law, it is subject to facial attack.

Id. at 55. And in dicta of its own, the *Morales* plurality explicitly rejected the *Salerno* test. *Id.* at 54 n.22 ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself. . . ."); *see also id.* at 69 (Kennedy, J., concurring) (concluding the statute was unconstitutional because it "would reach a broad range of innocent conduct"). At the same time, however, three Justices specifically endorsed the *Salerno* standard. *Id.* at 78-83 (Scalia, J., dissenting); *id.* at 111 (Thomas, J., joined by Rehnquist, C.J. and Scalia, C.J., dissenting).

The approach of the *Morales* plurality has not been adopted by the Supreme Court as a whole. Although panels of this Court have noted that *Morales* may have rejected the *Salerno* dicta, we have not concluded that a majority of the Supreme Court has done so. *See Lerman v. Bd. of Elections of New York*, 232 F. 3d 135, 144 n.10 (2d Cir. 2000) ("It is not even clear that *Salerno*'s 'no set of circumstances' test articulates an exclusive standard for making facial challenges *outside* the First Amendment context, as a plurality of the Supreme Court recently has noted." (citing *Morales*, 527 U.S. at 55 n.22) (emphasis in original)), *cert. denied*, 533 U.S. 915 (2001). We therefore are not required to apply it here. We note, nonetheless: first, that under the *Morales* plurality's approach, to invalidate as unconstitutionally vague on its face a statute that does not implicate First Amendment rights and might be valid under some set of circumstances, a court would have to conclude that the law is "permeated" with vagueness, and, perhaps,

that it infringes on a constitutional right and has no *mens rea* requirement, *see Morales*, 527 U.S. at 55 (opinion of Stevens, J.); and second, that under the analysis that follows, the statute before us is sufficiently clear to survive a facial challenge under either *Morales* or *Salerno*.[3]

B. Invalidity "As Applied"

Irrespective of whether and to what extent we may consider a facial challenge, we can determine whether 18 U.S.C. § 1346 is constitutional as applied to the defendants under the circumstances at issue. We conclude, for the reasons set forth below, that 18 U.S.C. § 1346 together with either section 1341 or section 1343, "gives the person of ordinary intelligence a reasonable opportunity to know," *Hoffman Estates*, 455 U.S. at 498, that conduct of the type in which the defendants engaged with the specific intent to defraud — use of the mails and wires to effect a scheme in which insurance adjusters were paid to induce them to expedite the settlement of the defendants' clients' insurance claims against the adjusters' employers without disclosure of the payments to the employers — deprived the insurance companies of the "honest services" of their employees and is therefore prohibited by law. Plainly, Messrs. Grae and Rybicki, as they used the wires and mails surreptitiously to, in effect, bribe employees of insurance companies to act in the interests of firm clients instead of the insurance companies, "had a reasonable opportunity to know" that they were violating sections 1341, 1343, and 1346. For the same reasons, we conclude that

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[3] In briefly outlining the history of facial challenges, we have noted that competing views in the Supreme Court have been set out in dicta and that, in our view, section 1346 withstands facial scrutiny under either. We therefore need not adopt, and do not mean to suggest our preference for, either.

18 U.S.C. § 1346, together with section 1341 or section 1343, provides explicit standards for those who seek to apply the statute, including federal prosecutors and courts, at least in the context of private-sector bribery cases such as this one. The statute, as applied, is therefore not unconstitutionally vague.

III. *Section 1346 and Its History*

A. "Honest Services" Mail and Wire Fraud until 1987

At the time the defendants committed the acts for which they were convicted, the federal mail-fraud statute, 18 U.S.C. § 1341, provided:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . ., for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id. (as in effect until September 13, 1994).[4] The federal wire-fraud statute, 18 U.S.C. § 1343, criminalized virtually the same behavior when it involved the use of the wires, radio, or television:

> **Fraud by wire, radio, or television**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id. (as in effect until September 13, 1994).

Until 1987, federal courts read both statutes to criminalize not only schemes for obtaining money or property, but also "schemes to deprive another of 'the intangible right of honest services.'" *United States v. Handakas*, 286 F. 3d 92, 101 (2d Cir.), *cert. denied*, 123 S. Ct. 168 (2002).

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[4] Sections 1341 was subsequently amended to apply to frauds carried out through private mail carriers. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XXV, § 250006, 108 Stat. 2087 (1994). Sections 1341 and 1343 have also been amended to eliminate the $1,000 limit on fines, *id.* Title XXXIII, § 330016(1)(H), 108 Stat. 2147, and to increase the maximum sentence for violations not affecting a financial institution to twenty years' imprisonment, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, Title IX, § 903, 116 Stat. 845 (2002).

> Over time, the "honest services" doctrine became applicable to four general categories of defendants: [1] government officials who defraud the public of their own honest services; [2] elected officials and campaign workers who falsify votes and thereby defraud the electorate of the right to an honest election; [3] private actors who abuse fiduciary duties by, for example, taking bribes; and [4] private actors who defraud others of certain intangible rights, such as privacy.

Id. at 101-02 (citing *McNally v. United States*, 483 U.S. 350, 362-64 nn.1-4 (1987) (Stevens, J., dissenting)) (brackets in original);[5] *see also* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 127-30 (1981) (describing non-money-or-property cases decided before 1981 as dealing with public corruption and the alleged breaches of a fiduciary duty to provide honest services "involv[ing] private officials, typically corporate officers and employees"); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, 3-15 (1998) (describing the mail-fraud statute as having evolved into three variations targeting different harms: "pecuniary mail fraud, honest services mail fraud, and intangible property mail fraud").

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[5] The fourth category does not include private actors who scheme to defraud others of intangible *property*, who remain subject to the mail- and wire-fraud statutes even after *McNally* held that deprivation of honest services was not covered by those statutes. *See Carpenter v. United States*, 484 U.S. 19, 27-28 (1987); *cf. United States v. Kent*, 608 F. 2d 542, 546 (5th Cir. 1979) (upholding fraud conviction of draftsman employed by an oil company paid by a competitor to purloin data regarding prospective well locations and bids on leases for land containing oil), *cert. denied*, 446 U.S. 936 (1980).

B. McNally v. United States

Then the Supreme Court decided *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, a public corruption case, the Supreme Court surveyed the history of the mail-fraud and wire-fraud statutes. It concluded with little effort that "[t]he mail fraud statute [18 U.S.C. § 1341] clearly protects property rights," *id.* at 356, but does not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly," *id.* at 358. Under *McNally*, all schemes or artifices to defraud relating to intangible rights to good government, honest services, privacy — indeed all things other than money or property — were therefore beyond the mail-fraud proscriptions. By necessary implication, the wire-fraud proscriptions were similarly limited. *See Rybicki*, 287 F. 3d at 261 (citing *United States v. Covino*, 837 F. 2d 65, 71 (2d Cir. 1988)).

McNally appears to have been decided largely on the basis of separation of powers considerations: Courts are not free to expand criminal liability for fraud beyond the clear statement of Congress. *McNally*, 483 U.S. at 360 ("'There are no constructive offences; and before one can be punished, it must be shown that his case is plainly within the statute.'" (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926))). Establishing federal criminal liability is the sole province of Congress. *Id.* at 359-60.

Although *McNally* therefore concluded that Congress had to "speak more clearly" if it would retain the honest services crime, *McNally*, 483 U.S. at 360, the Court did not — as we do today — consider whether the judicially developed honest services doctrine was vague, let alone unconstitutionally so. The requirement to "speak more clearly" did not mean that Congress had to provide a more specific definition of "honest services" than that

which the courts were then using. It meant only that Congress was required clearly to express its intention to criminalize that behavior if it wished to do so.

C. Enactment of Section 1346

In November of the year following *McNally*, Congress therefore enacted Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988), codified at 18 U.S.C. § 1346, which states simply:

> **Definition of "scheme or artifice to defraud"**
>
> For the purposes of this chapter [18 U.S.C. § 1341 *et seq.*], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Id. As the *Rybicki* panel observed, "Congress enacted § 1346 in response to *McNally* and reinstated the 'intangible rights' doctrine." *Rybicki*, 287 F. 3d at 261.

IV. *Determining the Meaning of Section 1346*

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion) (citing *Kolender v. Lawson*, 461 U.S. at 357); *accord id.* at 64-65 (O'Connor, J., concurring).[6] "'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . .'" *Id.* at 56 (quoting

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[6] Whether we are to examine 18 U.S. C. § 1346 on its face or as applied to the facts of the case before us to determine whether it is unconstitutionally vague is addressed in section V. E, below.

Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966)). "'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *Id.* at 58 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

In the view of the *Rybicki* panel:

> [B]ecause the statute does not define honest services, the potential reach of § 1346 is virtually limitless. *See* [*United States v.*] *Frost*, 125 F. 3d [346,] 368-69 [(6th Cir. 1997)] (discussing potential breadth of statute and "need to avoid the over-criminalization of private relationships"). As [the Court] ha[s] noted, "not every breach of an employee's fiduciary duty to his employer constitutes mail or wire fraud." *United States v. Carpenter*, 791 F. 2d 1024, 1035 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987); *see also United States v. Sun-Diamond Growers*, 138 F. 3d 961, 973 (D. C. Cir. 1998) (making same observation with respect to violations of § 1346).

Rybicki, 287 F. 3d at 264.[7]

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[7] The panel continued:

> Several circuits, addressing this concern, have interpreted "scheme or artifice to deprive another of the intangible right of honest services" in such a way as to properly curtail the statute's reach. *See, e.g.*, [*United States v. Sun-Diamond Growers*, 138 F. 3d 961, 973 (D. C. Cir. 1998)] (recognizing "the risk that federal criminal liability could metastasize" if § 1346 were read too broadly); *Frost*, 125 F. 3d at 365-69 (noting breadth of literal terms of § 1346 and discussing various approaches to defining reach of statute); *United States v. Cochran*, 109 F. 3d 660, 667 (10th Cir. 1997) (observing that "it would give [the court] great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing"); *United States v. Czubinski*, 106 F. 3d 1069, 1077 (1st Cir. 1997) (noting that Congress did not enact § 1346 "to create what amounts to a draconian personnel regulation");

We would, we think, labor long and with difficulty in seeking a clear and properly limited meaning of "scheme or artifice to deprive another of the intangible right of honest services" simply by consulting a dictionary for the literal, "plain" meaning of the phrase. But even if such a "clinical lexical dissection," *Immediato v. Rye Neck School Dist.*, 73 F. 3d 454, 460 (2d Cir.), *cert. denied*, 519 U.S. 813 (1996), would not yield a precise meaning to the statutes, that is not the end of our inquiry.

> It is a well-established rule of construction that "'[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); *see Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense").

United States v. Jain, 93 F. 3d 436, 441-42 (8th Cir. 1996) (discussing problems with extending "honest services" doctrine to private sector); *cf. United States v. Sawyer*, 85 F. 3d 713, 728 (1st Cir. 1996) (holding, in context of misconduct by state government employees, that "[t]o allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced").

Rybicki, 287 F. 3d at 264-65 (second and third alterations in original); *see also Handakas*, 286 F. 3d at 109 ("Even the circuits that have reinstated pre-*McNally* law recognize that *ad hoc* parameters are needed to give the statute shape." (citations omitted)).

Neder v. United States, 527 U.S. 1, 21-22 (1999) (ellipsis in original).[8] Our task, then, is to determine whether, even if the meaning of the statute is not plain enough on its face, there was a "well-settled meaning" of "scheme or artifice to deprive another of the intangible right of honest services" at the time that Congress enacted section 1346 in 1988.

The sparse legislative history of section 1346 makes clear, if little else, that the statutory provision was designed to "overrule" *McNally* at least in part, *i.e.*, to place within the statutory proscription certain frauds that *McNally* had held were not covered by the mail-and wire-fraud statutes. *See, e.g., United States v. Brumley*, 116 F. 3d 728, 742-45 (5th Cir.) (*en banc*) (Jolly & DeMoss, JJ., dissenting), *cert. denied*, 522 U.S. 1028 (1997); *see also United States v. Frost*, 125 F. 3d 346, 364 (6th Cir. 1997) (collecting authority for the proposition that the "[t]iming and the explicit terms of § 1346 make clear that Congress intended the provision to reinstate the doctrine of intangible rights to honest services"), *cert. denied*, 525 U.S. 810 (1998). Particularly in light of the strong presumption that section 1346, having been duly enacted by Congress and signed into law by the President, is valid, *Parker v. Levy*, 417 U.S. 733, 757 (1974) (citing *United States v. National Dairy*

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[8] In *Neder*, the Court held that materiality is an element of "a scheme or artifice to defraud" under the federal mail fraud, 18 U.S. C. § 1341, wire fraud, 18 U.S. C. § 1343, and bank fraud, 18 U.S. C. § 1344, statutes, even though the statutes do not use the term. 527 U.S. at 20-21. The Court concluded that at the times of enactment of these statutes, "fraud" had "a wellsettled meaning at common law," *id.* at 22, that included materiality, and the Court therefore "*presume*[*d*] that Congress intended to incorporate materiality," *id.* at 23 (emphasis in original).

Corp., 372 U.S. 29, 32-33 (1963)),[9] we must therefore look to the case law from the various circuits that *McNally* overruled in order to determine whether there was a clear meaning of "scheme or artifice to deprive another of the intangible right of honest services" at the time that Congress enacted section 1346, and then determine whether that meaning is sufficiently clear.[10]

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[9] The strong presumptive validity that attaches to an Act of Congress has led [the] Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E.g.*, *Jordan v. De George*, 341 U.S. 223, 231 (1951), and *United States v. Petrillo*, 332 U.S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E.g.*, *United States v. Rumely*, 345 U.S. 41, 47 (1953); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see Screws v. United States*, 325 U.S. 91 (1945).

Parker, 417 U.S. at 757 (1974) (quoting *United States v. National Dairy Corp.*, 372 U.S. 29, 32 (1963)); *see also*, *e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 268 (2002) (Rehnquist, C.J., dissenting) (arguing that a statute should be given a limiting construction, citing *Parker*, rather than struck down). *Parker*, upheld the constitutionality of certain provisions of the Uniform Code of Military Justice, after applying "the standard which applies to criminal statutes regulating economic affairs," *Parker*, 417 U.S. at 756, a category undoubtedly including the mail and wire fraud statutes.

[10] Although the *McNally* Court spoke of its fear of "constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," 483 U.S. at 360, the Court did not focus on federalism concerns. Perhaps it can be argued nonetheless, in light of the Supreme Court's later Commerce Clause cases, that if Congress wants to federalize such crimes it should do so in definite terms. *Cf. United States v. Bass*, 404 U.S. 336, 339 (1971) (holding that Congress must speak clearly when it legislates in areas of criminal law that are traditionally regulated by the states); *Cleveland v. United States*, 531 U.S. 12, 27 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.").

As acknowledged in *Neder*, 527 U.S. at 21-22, this approach is not dissimilar from the Supreme Court's examination of the common law at the time of passage of the Sherman Act, many generations ago, to determine the meaning of, *inter alia*, the phrase "[e]very contract, combination . . . or conspiracy, in restraint of trade." *See Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("Let us consider the language of [the Act], guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." (footnote omitted)).[11]

Some joining this opinion are of the view that this argument, although linked to the alleged vagueness of the statute, may be more powerful than vagueness alone. That is, the statute, as they read it, does not present serious problems either with respect to letting individuals know that their behavior violates the law, or leaving too much uncontrolled discretion to police or prosecutors. *See Kolender*, 461 U.S. at 357. The potentially more serious charge, they think, would be that Congress did not make clear enough how far it intended to enter into areas that have traditionally been governed by state law, and that this federalism concern, rather than vagueness, is the source of possible constitutional difficulties. We think, however, that when Congress enacted section 1346 in the light of the pre-*McNally* cases, it spoke with sufficient clarity to obviate the danger that federal courts, rather than Congress, would determine how deeply into traditionally state concerns the federal government ventured.

[11] This is not a principle somehow peculiar to the Sherman Act, as the dissent suggests. For example, *Neder* itself, like the case at bar, was a mail-and wire-fraud case. And in *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996), the Supreme Court took a similar approach to the interpretation of ERISA:

> To decide whether [a party's] actions fall within the statutory definition of "fiduciary" acts, we must interpret the statutory terms which limit the scope of fiduciary activity to discretionary acts of plan "management" and "administration." ERISA § 3(21)(A). These words are not self-defining, and the activity at issue here neither falls clearly within nor outside of the

We note, finally, that the particular wording of section 1346 leads us to regard this approach as likely to be fruitful. The statute refers to "a scheme or artifice to deprive another of *the* intangible right of honest services." 18 U.S.C. § 1346 (emphasis added). The definite article "the" suggests that "intangible right of honest services" had a specific meaning to Congress when it enacted the statute — Congress was re-criminalizing mail-and wire-fraud schemes to deprive others of *that* "intangible right of honest services," which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be. There is no reason to think that Congress sought to grant carte blanche to federal prosecutors, judges and juries to define "honest services" from case to case for themselves.[12]

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common understanding of these words. . . . Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law, which, over the years, has given to terms such as "fiduciary" and trust "administration" a legal meaning to which, we normally presume, Congress meant to refer. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

[12] We note a similar argument that has been made in a different context: *See* John Paul Stevens, *The Freedom of Speech*, 102 Yale L. J. 1293, 1296 (1993) ("I emphasize the word 'the' as used in the term 'the freedom of speech' [in the First Amendment] because the definite article suggests that the draftsmen intended to immunize a previously defined category or subset of speech."); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 Cal. L. Rev. 107, 116 (1982) (discussing "the distinction between that speech within 'the' freedom of speech [which receives special protection under the First Amendment] and that speech not within it."). While we find the parallel interesting, we of course have no occasion here to analyze, and do not endorse, the argument in the First Amendment context.

V. *The Meaning of Section 1346 in Light of Pre-*McNally *Case Law*

A. The Pre-*McNally* Cases — Generally

To determine what Congress intended when it recriminalized "honest services" fraud, we have reviewed the principal pre-*McNally* decisions involving or purportedly involving "honest services" fraud in the private sector.[13] The meaning of the phrase "scheme or

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[13] Our starting point in compiling a list of these cases is, as it was in *Handakas*, 286 F. 3d at 101-02, the pre-*McNally* private sector "honest services" cases catalogued by Justice Stevens in his dissent in *McNally*, 483 U.S. at 363-64 nn.3 & 4. The cases we have reviewed, based on that list as modified and augmented by our own research, are *United States v. Kwiat*, 817 F. 2d 440 (7th Cir.), *cert. denied*, 484 U.S. 924 (1987); *United States v. Schwartz*, 785 F. 2d 673 (9th Cir.), *cert. denied*, 479 U.S. 890 (1986); *United States v. Price*, 788 F. 2d 234 (4th Cir. 1986), *vacated sub nom. McMahan v. United States*, 483 U.S. 1015 (1987); *United States v. Conner*, 752 F. 2d 566 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985); *United States v. Lemire*, 720 F. 2d 1327 (D. C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Boffa*, 688 F. 2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) & 460 U.S. 1028 (1983); *United States v. Ballard*, 663 F. 2d 534 (5th Cir. Unit B 1981), *modified in part and reh'g denied*, 680 F. 2d 352 (5th Cir. Unit B 1982) (per curiam); *United States v. Bronston*, 658 F. 2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Von Barta*, 635 F. 2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. Bohonus*, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. McCracken*, 581 F. 2d 719 (8th Cir. 1978); *United States v. Hasenstab*, 575 F. 2d 1035 (2d Cir.), *cert. denied*, 439 U.S. 827 (1978); *United States v. Bryza*, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); *United States v. George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); and *Epstein v. United States*, 174 F. 2d 754 (6th Cir. 1949).

United States v. Louderman, 576 F. 2d 1383 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978), and *United States v. Condolon*, 600 F. 2d 7 (4th Cir. 1979), are referred to in one of the footnotes following the discussion of "honest services" in Justice Stevens's *McNally* dissent, 483 U.S. at 363-64 n.4, but neither of them employs that term "honest services" or seems to involve an honest services fraud. *Louderman* involved the defendants' acquisition of confidential information from telephone

artifice to defraud" with respect to public corruption cases is not at issue in the matter before us, and, although we have been given no reason to doubt that it is susceptible to a similar mode of analysis, we do not consider it.

The private-sector honest services cases fall into two general groups, cases involving bribes or kickbacks, and cases involving self-dealing.

B. The Bribery or Kickback Cases

In the bribery or kickback cases, a defendant who has or seeks some sort of business relationship or transaction with the victim secretly pays the victim's employee (or causes such a payment to be made) in exchange for favored treatment. In *United States v. George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973), an employee and two of his employer's suppliers were convicted of mail fraud for taking part in a scheme in which the suppliers secretly paid kickbacks to the employee in exchange for

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companies and the post office for purposes of furthering their "skip tracing" business. The Ninth Circuit noted "a loss to the subscribers of their right to privacy, and telephone subscribers and post office box holders were being deprived of part of the service for which they were paying." *Louderman*, 576 F. 2d at 1387. The defendants in *Louderman* are more properly characterized as depriving the victims of intangible rights, namely the right to privacy. *Condolon* — in which the Fourth Circuit upheld a wire-fraud conviction of a man who used the wires to procure sexual favors by pretending to be a talent agent — should similarly be characterized as a privacy case. *Louderman* and *Condolon* are thus not 'honest services' cases because of the nature of the litigation, not because, as the dissent suggests, were they to fall within the scope of section 1346, the wire-and mail-fraud statutes would be rendered unconstitutionally vague.

United States v. Curry, 681 F. 2d 406, 411 (5th Cir. 1982) (PAC chairman convicted of depriving the members of their right to his "honest, true and faithful services as chairman" by taking for himself money that should have been given to candidates), is also listed in Justice Stevens' dissent, *McNally*, 483 U.S. at 363-64 n.4, but is essentially an embezzlement case.

the employer's business. In *United States v. Bryza*, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976), a purchasing agent secretly accepted kickbacks from the suppliers from whom he bought products for his employer. The Seventh Circuit explained that "[t]he fraud consisted in [the defendant's] holding himself out to be a loyal employee, acting in [the employer's] best interests, but actually not giving his honest and faithful services, to [the employer's] real detriment." *Id.* at 422. In *United States v. Hasenstab*, 575 F. 2d 1035 (2d Cir.), *cert. denied*, 439 U.S. 827 (1978), a buyer for an airline was convicted of mail and wire fraud for receiving kickbacks from a supplier of business forms and computer paper in return for the buyer routing orders to the supplier, and giving the supplier advance information regarding its competitors' bids on contracts offered by the employer. *Id.* at 1036-38. In *United States v. Bohonus*, 628 F. 2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980), an officer and director of a corporation's subsidiaries was convicted of mail fraud for extorting insurance brokers doing business with the corporation by threatening to cancel contracts between the corporation and the insurance brokers unless the brokers agreed secretly to kick back a portion of their commissions to him. And in *United States v. Conner*, 752 F. 2d 566 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985), employees of two corporations and their co-conspirators secretly engaged in a variety of schemes in which they took secret kickbacks from real estate brokers doing business with their employers or secretly acquired interests in land their employers sought to acquire, and were therefore convicted of mail and wire fraud. *Id.* at 569-72.

Cases involving union officials tend to fit the pattern of the private-sector bribery cases.[14] In *United States v. Schwartz*, 785 F. 2d 673 (9th Cir.), *cert. denied*, 479 U.S. 890 (1986), a double jeopardy case, union officials were accused of giving union insurance contracts to third parties as payment on a secret arrangement in which the third parties lobbied the union national for actions that would allow the officials to keep their positions and avoid an impending union election. *Id.* at 675-76. Although the officials were indicted for wire fraud, none were convicted. *Id.* at 678. In *United States v. Boffa*, 688 F. 2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) & 460 U.S. 1028 (1983), a union official was convicted of mail fraud for taking bribes from an employer in exchange for helping the employer de-unionize. *Id.* at 923-24. And in *United States v. Price*, 788 F. 2d 234 (4th Cir. 1986), *vacated sub nom. McMahan v. United States*, 483 U.S. 1015 (1987), union officials were convicted of mail fraud and conspiracy to commit mail fraud for obtaining union memberships for persons who were not qualified for them in exchange for payments beyond ordinary union fees, which were diverted to the officials. *Id.* at 235.

C. The Self-Dealing Cases

In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer. In *Epstein v. United States*, 174 F. 2d 754 (6th Cir. 1949), the defendants, who were officers and directors of two brewing companies, caused the companies to enter into contracts to purchase supplies from companies in which the defendants allegedly had

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[14] Because federal law imposes special duties of loyalty on union officials, analysis of such cases may depart from analysis of other private sector cases.

secret ownership interests.[15] In *United States v. McCracken*, 581 F. 2d 719 (8th Cir. 1978), the defendant was convicted of mail fraud for using a corporation, in which he had an interest unknown to his employer, to buy and sell fertilizer to and from the employer to the employee's advantage and his employer's disadvantage. In *United States v. Von Barta*, 635 F. 2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981), the defendant, an employee of a brokerage firm, was indicted for committing mail and wire fraud by causing his employer to extend credit to an undercapitalized investment fund in which the defendant secretly owned a half interest. The defendant did not disclose to his employer that he partly owned and controlled the fund, or that the fund was insufficiently capitalized under the employer's criteria for extending credit. *Id.* at 1002-03.

In *United States v. Ballard*, 663 F. 2d 534 (5th Cir. Unit B 1981), *modified in part and reh'g denied*, 680 F. 2d 352 (5th Cir. Unit B 1982), the Fifth Circuit held, with respect to a scheme among employees to make secret profits trading fuel oil, that mail fraud could be established only if there was some detriment to the employer. Where the profit made by the employer was, in any event, the maximum fixed by law, there could be no such detriment and there was therefore no "honest services" fraud. *See id.* at 354 n.5. In *United States v. Lemire*, 720 F. 2d 1327 (D. C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984), the defendant was convicted of wire fraud for helping a bidder, on a contract to supply housing overseas, win a contract bid with his

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[15] The Sixth Circuit found the dealing nonetheless to be "fair" and therefore reversed mail-fraud convictions remarking that "it must . . . be concluded that the failure to make . . . disclosure [of the secret ownership in the supplier] did not clothe this otherwise fair course of dealing with intentional fraud, dishonest in purpose, and inconsistent with moral uprightness." *Id.* at 768.

employer in order secretly to supply the shipping himself. And in *United States v. Kwiat*, 817 F. 2d 440 (7th Cir.), *cert. denied*, 484 U.S. 924 (1987), the co-conspirator defendants, who were officers and directors of a bank, had been convicted of mail fraud for causing the bank to make unsound loans to persons buying condominiums through a real-estate company some of the defendants controlled, for the purpose of generating secret commissions for the co-conspirators. *Id.* at 472. The Seventh Circuit reversed the defendants' conviction because of an insufficient relationship between the fraudulent scheme and the use of the mails. *Id.* at 444.

The self-dealing cases are thus of the same general import as the bribery cases, with this apparent difference: In bribery or kickback cases, the undisclosed bribery itself is sufficient to make out the crime, but in self-dealing cases, the existence of a conflict of interest alone is not sufficient to do so. *See Lemire*, 720 F. 2d at 1336 ("An employee's undisclosed conflict of interest does not by itself necessarily pose the threat of economic harm to the employer."); *Ballard*, 663 F. 2d at 540 ("[A] breach of fiduciary duty can constitute an illegal fraud under § 1341 only when there is some detriment to the employer."); *Epstein*, 174 F. 2d at 765 ("[T]he receipt of such returns by a director without disclosure of interest to the board of directors does not constitute the perpetration of an active, intentional fraud upon his corporation where there is good faith, fair dealing, and benefit to the corporation of which he is a director."). In the self-dealing context, though not in the

bribery context, the defendant's behavior must thus cause, or at least be capable of causing, some detriment — perhaps some economic or pecuniary detriment — to the employer.[16]

D. The Meaning of Section 1346 in Private-Sector Cases

In sum, we conclude from the cases in the various circuits that had employed an "honest services" theory prior to Congress's enactment of section 1346 that the term "scheme or artifice to deprive another of the intangible right to honest services" in section 1346, when applied to private actors, means a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers[17]) to

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[16] *United States v. Bronston*, 658 F. 2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), was atypical. A partner in a New York law firm undertook, and was paid for, representing a personal client in its pursuit of a contractual relationship, while knowing that his firm was representing a competing client seeking the same contract. The defendant was convicted of mail fraud and we affirmed, reading the "theft of honest services" crime broadly, and finding a possibility of detriment in the firm's client's loss of "the precise interest which [the firm] had been retained to defend." *Id.* at 930. But the defendant neither personally represented the firm's client nor used confidential information acquired through the representation to his own client's advantage. The risk of detriment to the firm's client was that an adverse party was represented by the attorney it wanted. Although the firm's client did risk losing the contract it sought, this risk was not caused by a loss of honest services. *Cf.* Coffee, *supra*, 19 Am. Crim. L. Rev. at 130-34 (criticizing *Bronston*).

[17] Although the bulk of the pre-*McNally* honest-services cases involved employees, we *see* no reason the principle they establish would not apply to other persons who assume a legal duty of loyalty comparable to that owed by an officer or employee to a private entity. *See, e.g.*, *United States v. Szur*, 289 F. 3d 200, 208-12 (2d Cir. 2002) (affirming honest services mail and wire fraud convictions of principals of a brokerage and issuer of securities who conspired to pay stock brokers

purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person. As noted, in self-dealing cases, unlike bribery or kickback cases, there may also be a requirement of proof that the conflict caused, or at least was capable of causing, some detriment — but that is of no moment with respect to the case at bar, which involves secret payments, not conflicts of interest.

In the case before us, the defendants used the mails and wires to induce insurance adjusters, who were purporting to act for and in the interests of their employer insurance companies, secretly to expedite insurance claims in order to advance their own interest in receiving payments from the defendants. These actions were not disclosed to the employer insurance companies, and hence were accompanied by a material omission. They fall squarely within the

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excess compensation, not disclosed to their customers, for selling the issuer's securities); *United States v. Manas*, 272 F. 3d 159, 161-63 (2d Cir. 2001) (reviewing sentences of defendants convicted of, *inter alia*, honest services fraud for a broker bribery scheme similar to that at issue in *Szur*), *cert. denied*, 123 S. Ct. 533 (2002) & 123 S. Ct. 1003 (2003); *United States v. Ervasti*, 201 F. 3d 1029, 1032-36 (8th Cir. 2000) (upholding honest services mail and wire fraud convictions of principals of a payroll processing company who failed to make payments to the IRS on behalf of customers, instead using the funds to pay their own expenses); *United States v. Sancho*, 157 F. 3d 918 (2d Cir. 1998) (upholding honest services wire fraud conviction of a defendant who offered a bribe to an FBI agent posing as a financial consultant retained to perform due diligence on the defendant in connection with the issuance of a letter of credit, in exchange for a falsely positive due diligence report) (per curiam), *cert. denied*, 525 U.S. 1162 (1999); *United States v. Cochran*, 109 F. 3d 660, 667-68 (10th Cir. 1997) (analyzing, for honest-services fraud purposes, the duty owed by an investment banker hired to advise and assist a state in issuing bonds).

meaning of "scheme or artifice to deprive another of the intangible right of honest services" as distilled from the pre-*McNally* private sector cases. At the end of the day, we simply cannot believe that Messrs. Rybicki and Grae did not know that they were courting prosecution and conviction for mail and wire fraud when they undertook to use the wires and the mails, in effect, to pay off insurance adjustors, while assiduously covering their tracks.

Because we find that the phrase "scheme or artifice to deprive another of the intangible right of honest services" has the meaning it had in the pre-*McNally* case law, we think that the potential reach of section 1346 is not "virtually limitless," *Rybicki*, 287 F. 3d at 264. We conclude that the statute, as applied to the defendants' intentionally fraudulent behavior, "define[s] the criminal offense with sufficient definiteness that ordinary people [such as the defendants] can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. It will also "channel the discretion of the prosecution," *Handakas*, 286 F. 3d at 101; "it will provide[ ] explicit standards for those who apply it," *id.* (citation and internal quotation marks omitted). The statute *as applied to the facts of this case* is therefore not unconstitutionally vague.

The dissent makes much of the differing views among the various circuit courts of appeals in interpreting section 1346, suggesting the hopeless vagueness of the statute. In doing so, it studiously ignores one striking unanimous aspect of the case law: No circuit has ever held, as the dissent would, that section 1346 is unconstitutionally vague.

More important, divergence in panel or circuit views of a statute, criminal or otherwise, is inherent — and common — in our multi-circuit system. Disparity does not establish vagueness. For one of any number of examples, *see Bailey v. United States*, 516 U.S. 137 (1995) (holding

that 18 U.S.C. § 924(c)(1), which, in relevant part, imposes a prison term upon a person who "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm," requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the drug trafficking offense). There, the Supreme Court clarified the meaning of section 924(c)(1) after observing that: "As the debate within the District of Columbia Circuit illustrates, § 924(c)(1) has been the source of much perplexity in the courts. The Circuits are in conflict both in the standards they have articulated and in the results they have reached." *Id.* at 142 (citations omitted). The Court did not suggest, let alone conclude, based upon the diversity of views within the D. C. Circuit or among the circuits — the "perplexity" — that section 924(c)(1) was unconstitutionally vague.

The dissent may thus be making a valid argument that the Supreme Court, a large part of whose work consists of resolving just such "perplexity," should in an appropriate case seek to resolve inconsistencies in circuit analysis of section 1346. But it proves too much to argue from such circuit divisions that a statute is unconstitutionally vague. If so, there are a frightful number of fatally vague statutes lurking about.

The dissent also argues that the prosecution of persons whose behavior is not within our view of the prohibition of section 1346 — in *Handakas*, discussed *infra*, for example — shows the vagueness of the statute. We doubt that such occasional prosecution in error is much evidence that a statute is too vague. (Mr. Bailey was prosecuted in error, too, for using or carrying a firearm during a drug trafficking crime, but that did not establish that the statute under which he was prosecuted was unconstitutional. *See Bailey, supra*; *see also Hubbard v. United States*, 514

U.S. 695, 697-98, 715 (1995) (reversing a defendant's criminal conviction under 18 U.S.C. § 1001 for making false statements "in any matter within the jurisdiction of any department or agency of the United States" after concluding that the conduct for which the defendant was prosecuted, making false statements in a federal judicial proceeding, did not fall within the scope of the statute, but not thereby concluding that the statute was fatally vague).) Prosecutors sometimes make mistakes as to the reach of criminal statutes; courts correct them. The very project of considering this section 1346 case in banc, moreover, was undertaken in the hope and expectation that a decision in this case, outlining our understanding of the statute in some detail and explaining why, under the statute, the prosecution in *Handakas* was misdirected, would go some way to make any such future prosecutorial misjudgment less likely.

E. The Facial Validity of Section 1346

While it is unclear, for reasons discussed in Part II of this opinion, whether it is appropriate to decide the question of the asserted facial invalidity of section 1346, we think that a conclusion of facial invalidity would be inconsistent with the foregoing analysis. Our analysis reveals that the statute's clear prohibition applies to a wide swath of behavior. We conclude that the statute is not unconstitutional on its face under either *Salerno* or *Morales*.

F. The Effect of Our Analysis on Previous Decisions

1. *The Holding of* United States v. Handakas.

In *Handakas*, a panel of this court held that section 1346 was unconstitutionally vague as applied to a bid contractor working for a state school authority who willfully breached a contractual requirement that he pay the prevailing wage to his employees, and misrepresented the wages on

disclosure forms that he was required by law to file with the state. *Handakas*, 286 F. 3d at 96-97. Under the analysis set forth above, it is clear that the defendant's conduct in that case was not within the scope of behavior proscribed by section 1346: *Handakas* was not an employee of a private entity purporting to act for and in the interests of his or her employer; neither was he rendering services in which the relationship between him and the person to whom the service was rendered gave rise to a duty of loyalty comparable to that owed by employees to employers. His actions therefore did not come within the reach of section 1346.

There was thus no reason to reach the constitutional question in *Handakas*. In light of our duty to avoid passing on constitutional questions whenever possible, *see id.* at 113-14 (Feinberg, J., dissenting in part), we overrule the unnecessary constitutional ruling in that case without reviewing it on its merits.

Because we conclude that *Handakas*'s conduct was not within the scope of section 1346, we have no occasion to conclude, as the *Handakas* panel did, that "the intangible right to honest services" covered by section 1346 can *never* arise in that context. *See Handakas*, 286 F. 3d at 106-07. We note only that because of the nature of the services to be rendered in *Handakas*, an intangible right to honest services did not arise out of the contract at issue in that case.[18]

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[18] We do not consider the application of section 1346 to the contractual situations discussed by Judge Raggi in her concurrence.

2. *The Dictum in* Sancho *and* Handakas.

In *United States v. Sancho*, 157 F. 3d 918 (2d Cir. 1998), *cert. denied*, 525 U.S. 1162 (1999), we suggested that pre-*McNally* case law is not "pertinent" when we apply section 1346. *Id.* at 921 ("Whether, prior to the passage of § 1346, the elements of § 1342 as applied to deprivations of intangible rights required a scheme to breach a fiduciary duty is . . . no longer pertinent."); *see also Handakas*, 286 F. 3d at 103 (citing *Sancho* as authority for the proposition that "[t]his Circuit has foreclosed the use of pre-*McNally* cases as a tool for construing the revised statute."). Our analysis here is based on pre-*McNally* case law. We therefore reject that dictum in *Sancho* and *Handakas*.[19]

We note, however, that we look to cases decided before the enactment of section 1346 only in order to determine what section 1346 meant to Congress when it enacted the statute. We do not think that that earlier case law is, after the intervening occurrences of *McNally* and section 1346, "precedent" in the sense that it sets forth rules of law that we are bound to follow. We might look to nineteenth-century common law to determine what a "combination in restraint of trade" is, but that common law itself does not thereby become binding upon us. The pre-*McNally* case law is "pertinent," even though we are not bound by it in the *stare decisis* sense.

VI. *The Intent Required for a Section 1346 Violation*

With respect to the intent necessary to make out a violation, we agree with the *Rybicki* panel's observation that, in accordance with our post-1988 case law, actual or intended economic or pecuniary harm to the victim need not be established. *Rybicki*, 287 F. 3d at 261. "[T]he only

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[19] The dissent insists that the statement from *Sancho* that we address was not a dictum. If so, to that extent, *Sancho* is overruled.

intent that need be proven in an honest services fraud is the intent to deprive another of the intangible right of honest services." *Id.* at 262 (citing *Sancho*, 157 F. 3d at 921).

VII. *"Reasonably Foreseeable Harm" or "Materiality"?*

The *Rybicki* panel also "h[e]ld that the elements necessary to establish the offense of honest services fraud pursuant to 18 U.S.C. § 1346 are: (1) a scheme or artifice to defraud; (2) for the purpose of depriving another of the intangible right of honest services; (3) where it is reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimis*; and (4) use of the mails or wires in furtherance of the scheme." *Rybicki*, 287 F. 3d at 266. We agree as to the first, second and fourth elements of the crime, but disagree as to the third.

Courts defining the elements of "honest services" fraud have chosen between two tests, "reasonably foreseeable harm" and "materiality." *See United States v. Vinyard*, 266 F. 3d 320, 327-28 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002). The "reasonably foreseeable harm" standard has had, as the *Rybicki* panel noted, several incarnations. In the version that the *Rybicki* panel adopted, it must have been "reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victim that [was] more than *de minimis*." 287 F. 3d at 266.

In *Vinyard*, the Fourth Circuit explained that under the competing "materiality" test, the trier of fact determines whether the misrepresentation "has the natural tendency to influence or is capable of influencing the employer to change his behavior." 266 F. 3d at 328 (citation and internal quotation marks omitted). The *Rybicki* panel identified three Circuits that have taken an approach similar to the Fourth Circuit's. *See Rybicki*, 287 F. 3d at 265 (citing *United States v. Cochran*, 109 F. 3d 660, 667

(10th Cir. 1997); *United States v. Gray*, 96 F. 3d 769, 772, 776-77 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997); *United States v. Jain*, 93 F. 3d 436, 441-42 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997)). We agree with these Circuits, and adopt the materiality test, holding that the misrepresentation or omission at issue for an "honest services" fraud conviction must be "material," such that the misinformation or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct. *See Gray*, 96 F. 3d at 774-75 (quoting *Ballard*, 680 F. 2d at 353 (internal quotation marks omitted)). The question whether it is the *business* conduct of the defrauded victim that must always be at issue is not before us and we therefore do not decide it. *See id.*

We prefer the "materiality" test because it has the virtue of arising out of fundamental principles of the law of fraud: A *material* misrepresentation is an element of the crime. *See, e.g., Bronston*, 658 F. 2d at 927.[20] The "non-*de minimis* reasonably foreseeable harm" test, by contrast, seems to be something of an *ipse dixit* designed simply to limit the scope of section 1346. *See, e.g., Vinyard*, 266 F. 3d at 328-29. As such, its foundation appears less secure.

In the case of private actors, at least, the "materiality" test captures those cases covered by the *Rybicki* panel opinion's version of the "reasonably foreseeable harm" test. Where it is "reasonably foreseeable that the scheme could cause some [non-*de minimis*] economic or pecuniary harm to

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[20] We do understand that this creates something of an overlap: The phrase "scheme or artifice to defraud" requires "material misrepresentations." *See United States v. Autuori*, 212 F. 3d 105, 115 (2d Cir. 2000) ("As to the [scheme to defraud], the government was required to prove (i) the existence of a scheme to defraud, (ii) the requisite scienter (or fraudulent intent) on the part of the defendant, and (iii) the materiality of the misrepresentations." (citations omitted)); *see also Neder*, 527 U.S. at 25 ("[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.").

the victim," *Rybicki*, 287 F. 3d at 266, the misrepresentation is material because, in such cases, the victim's knowledge of the scheme would tend to cause the victim to change his or her behavior.

The reasonably foreseeable harm test of the *Rybicki* panel opinion, however, is limited to "economic or pecuniary harm." In this respect "materiality" may be a somewhat broader test: It may capture some cases of non-economic, yet serious, harm in the private sphere.

We expect the materiality requirement also to perform the function for which the panel opinion's "*de minimis*" requirement was designed. We doubt that the failure to disclose to an employer a *de minimis* "bribe" — the free telephone call, luncheon invitation, or modest Christmas present — is a *material* misrepresentation in the sense in which we and other Circuits use the term.

The district court instructed the jury not only, as the district court noted, *id.* at 266, as to reasonable forseeability, but also that to convict, the jury was required to find that the scheme or artifice of the defendants employed to its ends material omissions in the information given to the insurance companies by their employees. We think that based on the evidence presented at trial with respect to such omissions, the jury could reasonably have concluded that they occurred and that they were material.

CONCLUSION

We conclude that the behavior of the defendants falls squarely within the meaning of a "scheme or artifice to deprive another of the intangible right of honest services," measuring it against the use of the term in the case law at the time section 1346 was adopted. The phrase "scheme or artifice [to defraud] by depriv[ing] another of the intangible right of honest services," in the private sector context, means a scheme or artifice to use the mails or

wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person. The defendants in this case, using the mails and the wires with specific intent to defraud, caused the insurance-adjuster employees of the insurance companies to be bribed so that the insurance companies would pay claims in a manner that was not in the interests of the insurance companies but was, instead, secretly in the interests of the defendants. There were material omissions in the employees' communications with their employers that were necessary to the success of the scheme. The defendants' behavior therefore fell within the statutes' clear proscription.

There was sufficient evidence at trial to establish the four elements of the crime: (1) a scheme or artifice to defraud; (2) for the purpose of knowingly and intentionally depriving another of the intangible right of honest services as thus defined; (3) where the misrepresentations (or omissions) made by the defendants are material in that they have the natural tendency to influence or are capable of influencing the employer to change its behavior; and (4) use of the mails or wires in furtherance of the scheme.

The judgments of conviction and sentence of the district court are therefore affirmed.

USA v RYBICKI

00-1043 (L), 00-1044, 00-1052, 00-1055
December 29, 2003

KATZMANN, *Circuit Judge*, concurring:

I join the majority's opinion insofar as it affirms the judgments of conviction and sentences of the District Court by concluding that: (1) § 1346 is not unconstitutionally vague as applied to the defendants before us; (2) the evidence adduced at trial sufficiently supports their convictions; and (3) the trial judge properly instructed the jury on the elements of the crimes. I respectfully disagree, however, with the manner in which the majority addresses the constitutional question of whether § 1346 is vague on its face.

I recognize that this Court invited the parties to brief the constitutional issue of the facial vagueness of § 1346. But we should be ever mindful of the firmly entrenched tenet of constitutional adjudication that courts should "avoid[ ] the premature adjudication of constitutional questions." *Clinton v. Jones*, 520 U.S. 681, 690 (1997). The Supreme Court has counseled that "'[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

In the present case, we can easily avoid adjudicating the constitutional issue of § 1346's facial vagueness. The defendants did not present a facial challenge to § 1346 before either the District Court or the original panel. Therefore, as the majority observes, we apply the plain error standard of Federal Rule of Criminal Procedure 52 (b).

That standard requires that before we exercise our discretion to correct a forfeited error, there be (1) error that is (2) plain, that (3) affects substantial rights, and that (4) seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993). It cannot be said that any error with respect to facial vagueness is plain under current law, in a circumstance where "every circuit court to address the specific question of [facial] vagueness since the phrase 'honest services' appeared in the statute has found § 1346 to be constitutional on its face." *United States v. Handakas*, 286 F. 3d 92, 114 (2d Cir. 2002) (Feinberg, J., concurring in part and dissenting in part). Moreover, the majority itself acknowledges that it is not clear whether it is proper for us to decide whether § 1346 is facially invalid because First Amendment concerns are not implicated. Maj. op. **[at 35]**; see, *e.g.*, *United States v. Nadi*, 996 F. 2d 548, 550 (2d Cir. 1993) ("[V]agueness challenges that do not involve the First Amendment must be examined in light of the specific facts of the case at hand and not with regard to the statute's facial validity."). Accordingly, even if there were error, it was surely not plain. It was thus unnecessary for the majority to consider the standard to be applied in evaluating facial vagueness challenges.

I therefore do not join sections II. A and V. E of the majority opinion. I concur, however, with the remainder of the majority opinion.

USA v RYBICKI

00-1043 (L), 00-1044, 00-1052, 00-1055
December 29, 2003

REENA RAGGI, Circuit Judge, concurring in the judgment:

I join the court in rejecting defendants' vagueness challenge to 18 U.S.C. § 1346 and in affirming the judgments of conviction. I write separately on the vagueness issue because I reach this conclusion via a somewhat different route from my colleagues in the majority. Specifically, while I agree that defendants' facial vagueness challenge to § 1346 fails whether reviewed as applied pursuant to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), or more broadly pursuant to *City of Chicago v. Morales*, 527 U.S. 41 (1999), I am of the view that *Morales* analysis is, in fact, unwarranted in this case. Further, unlike the majority, I rely on the language of the statute in rejecting defendant's vagueness challenge; thus, I agree with the majority's distillation of the pre-enactment "honest services" cases insofar as that analysis reinforces the constitutional application of the statutory text to this case. I do not, however, agree with the majority's decision to reaffirm *United States v. Handakas*, 286 F. 3d 92 (2d Cir. 2002), or with its conclusion that in cases involving self-dealing frauds, the criminal scheme must be capable of causing economic or pecuniary detriment to fall within the constitutional limits of § 1346.

I. Defendants' Vagueness Challenge to 18 U.S.C. § 1346 Should Be Reviewed Only as Applied to the Facts of this Case

I agree with my colleagues in the majority that the term "the intangible right to honest services," as used in § 1346 to define a "scheme or artifice to defraud" prohibited by 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud), is not unconstitutionally vague

whether subjected to as-applied analysis, *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 495 & n.7 (1982) (and cases cited therein), or to some broader standard of facial review, *see City of Chicago v. Morales*, 527 U.S. at 62 (Stevens, J., writing for the Court in part V). That being said, I conclude that only as-applied analysis is warranted in this case. Because the majority applies both *Flipside* and *Morales*, however, while the dissent insists on the "*Morales* test," district courts may conclude, in an abundance of caution, that they should engage in *Morales* review whenever presented with a claim of facial vagueness. This, I fear, would mark a radical and unwarranted departure from the tradition of as-applied review.

The long-standing preference for "as-applied" review of statutory vagueness challenges is "[e]mbedded in the traditional rules governing constitutional adjudication," notably, in "the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)). This principle serves the jurisprudential maxim that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Thus, if a federal statute can constitutionally be applied to a particular defendant's case, a court is obliged to construe the law to cover at least that circumstance. *See generally Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (noting courts' "categorical" duty to seek "every reasonable construction . . . to save a statute from unconstitutionality" (internal quotation marks omitted)).

The Supreme Court has recognized "limited exceptions" to the principle of as-applied review, but "only because of the most 'weighty countervailing policies,'" notably, when a challenged statute, on its face, threatens conduct protected by the First Amendment. *Parker v. Levy*, 417 U.S. at 759 (quoting *Broadrick v. Oklahoma*, 413 U.S. at 611 (noting exception made for challenges to statutes implicating First Amendment rights)); *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Dombrowski v. Pfister*, 380 U. S 479, 486 (1965). Even in such circumstances, however, a court must presume the validity of the statute, *see Parker v. Levy*, 417 U.S. at 757, and cannot construe it "'to violate the Constitution if any other possible construction remains available,'" *Rust v. Sullivan*, 500 U.S. at 190 (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979)). As the Supreme Court has repeatedly cautioned, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. at 613).

Thus, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, the Supreme Court composed a variation on the theme of as-applied analysis for cases raising facial challenges to laws that "do[ ] not reach constitutionally protected conduct." In those circumstances, a facial challenge can succeed only if the complainant demonstrates "that the law is impermissibly vague in all of its applications." *Id.* at 497; *accord id.* at 507-08 (White, J., concurring in the judgment). In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court reiterated this principle in a criminal case: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." In practice, the *Flipside/Salerno* rule requires

hypothetical analysis of "all applications" only in cases of pre-enforcement vagueness challenges. *See, e.g., Richmond Boro Gun Club, Inc. v. City of New York*, 97 F. 3d 681, 684-86 (2d Cir. 1996). Where, as in this case, defendants have already been prosecuted for specific conduct under the challenged law, *Flipside* itself instructs that a court confronting a facial vagueness challenge should "examine the complainant's conduct before analyzing other hypothetical applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 495.

City of Chicago v. Morales represents no sharp break from established principles requiring statutes to be construed to uphold their constitutionality and favoring as-applied review of vagueness challenges. *See* 527 U.S. at 71 (Breyer, J., concurring in part and concurring in the judgment). Our dissenting colleagues suggest that *Morales* identifies a broader two-prong test for vagueness review: does the law at issue (1) "fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits," and (2) "authorize and even encourage arbitrary and discriminatory enforcement." *id.* at 56 (plurality opinion by Stevens, J., joined by Souter and Ginsburg, JJ.); *id.* at 64-65 (O'Connor, J., joined by Breyer, J., concurring in part and concurring in the judgment). In fact, this simply restates the twin due process concerns that have traditionally informed vagueness analyses. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *accord Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 498. A court confronting a vagueness challenge must still decide whether to examine these concerns only in light of the particular case at hand or whether special circumstances warrant broader facial inquiry.

In *Morales*, three factors — none present in this case — prompted the Supreme Court to review a Chicago loitering ordinance for facial vagueness without regard to any

specific application: (1) the law implicated constitutional rights, (2) it lacked a *mens rea* requirement, and (3) the state supreme court had declined to construe the law narrowly to avoid reaching innocent loitering.

In the view of three justices, the Chicago loitering ordinance implicated constitutional rights because "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *City of Chicago v. Morales*, 527 U.S. at 53 (plurality opinion by Stevens, J., joined by Souter and Ginsburg, JJ.). That fact, coupled with the ordinance's lack of an intent element, distinguished the case from *Flipside*: "This is not an ordinance that simply regulates business behavior and contains a scienter requirement. It is a criminal law that contains no *mens rea* requirement and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55 (internal citations and quotation marks omitted).

The federal mail and wire fraud statutes are plainly not "such a law."[1] The conduct at issue — fraud — enjoys no constitutional protection, whether the deceitful scheme is aimed at a victim's property or at his intangible right to honest services. *See Plumley v. Massachusetts*, 155 U.S. 461, 479 (1894) ("The constitution of the United States does not secure to any one the privilege of defrauding the public."); *see also Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 123 S. Ct. 1829, 1836 (2003) (noting that fraud is not conduct protected by the First Amendment). Further, mail and wire fraud do require proof of *mens rea*:

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[1] Although defendants' vagueness challenge is specifically to § 1346, because that statute only defines conduct proscribed by § 1341 and § 1343, a court must consider all elements of mail and wire fraud in determining whether the public and the police are given fair notice of what constitutes the crime.

a defendant must act or fail to act with "the specific intent to harm or defraud the victims of the scheme." *United States v. Walker*, 191 F. 3d 326, 334 (2d Cir. 1999); *see United States v. DiNome*, 86 F. 3d 277, 283 (2d Cir. 1996) ("fraudulent intent is '[e]ssential to a scheme to defraud'" (quoting *United States v. D'Amato*, 39 F. 3d 1249, 1257 (2d Cir. 1994)); *United States v. Regan*, 937 F. 2d 823, 827 (2d Cir. 1991) (mail and wire fraud are "specific intent crimes" requiring proof of defendant's "'conscious knowing intent to defraud'" (quoting *United States v. Kyle*, 257 F. 2d 559, 564 (2d Cir. 1958)).

My dissenting colleagues suggest that these distinctions are of no import because three other justices in *Morales* — Justices O'Connor, Kennedy, and Breyer — made no reference to constitutional rights or an intent requirement while concurring in holding the Chicago ordinance facially vague. *See* **[Dis. Op. at 63]**. The dissent concludes that "[t]he *only* proposition attracting a majority in *Morales* was that a criminal statute that 'reach[es] a substantial amount of innocent conduct' and thereby fails to establish 'minimal guidelines to govern law enforcement' is, on its face, unconstitutionally vague." **[Dis. Op. at 64]** (emphasis in original).

Identifying "majority" views among the four opinions of the six justices who ruled the Chicago ordinance facially invalid is sometimes a difficult task. I agree that the threat to innocent conduct — whether or not specifically protected by the Constitution — was a critical issue in *Morales*, but I understand this concern to have been inextricably linked to the law's failure to require proof of harmful intent. Indeed, the six justices in the *Morales* "majority" joined in concluding that the vagueness challenge in that case would have failed if the Chicago ordinance had been limited "to loitering that had an apparently harmful purpose." *City of Chicago v. Morales*, 527 U.S. at 62 (Stevens, J., writing

for the Court in part V); *see also id.* at 67 (O'Connor, J., concurring in part and concurring in the judgment) (emphasizing that "the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a 'harmful purpose' ").[2] Their conclusion accords with the established "doctrine that a scienter argument may save a statute which might otherwise have to be condemned for vagueness." *United States v. Curcio*, 712 F. 2d 1532, 1543 (2d Cir. 1983) (Friendly, J.); *cf. Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (and cases cited therein) (recognizing that "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*").

In *Morales*, Justice O'Connor offered examples of how the loitering ordinance could be construed to include an intent requirement, thereby eliminating vagueness concerns. *See City of Chicago v. Morales*, 527 U.S. at 68 (O'Connor, J., concurring in part and concurring in the judgment) ("The term 'loiter' might possibly be construed in a more limited fashion to mean 'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.' "). The difficulty, as the six justices recognized, was that the Illinois Supreme Court had expressly declined to limit the statute in this way, *see id.* at 50-51 (Stevens, J., writing for the Court in part II), and the United States Supreme Court was bound by that interpretation of state law, *see id.* at 61 (Stevens, J., writing for the Court at part V); *id.* at 68 (O'Connor, J., concurring in part and concurring in the judgment) (questioning state court interpretation of ordinance while recognizing its binding effect); *see also id.* at 69 (Kennedy, J., concurring in

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[2] Because the federal fraud statutes only reach deceitful schemes specifically intended to cause harm, they survive a facial vagueness challenge even under the *Morales* standard of review.

part and concurring in the judgment); *id.* at 73 (Breyer, J., concurring in part and concurring in the judgment). Because the Supreme Court was thus powerless to construe the ordinance more narrowly as applied to *any* case, a majority concluded that it was obliged to declare the law unconstitutionally vague in *all* applications. *See id.* at 61 & n.31 (Stevens, J., writing for the Court in part V); *see also id.* at 68 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 71 (Breyer, J., concurring in part and concurring in the judgment).

This case plainly differs from *Morales* in each of the three respects relevant to the Court's decision to conduct facial review without regard to specific application. First, as already noted, defendants can claim no constitutional protection for fraudulent conduct. Second, whatever debates there might be about the parameters of the "right to honest services" in a variety of imaginative scenarios, the federal fraud statutes, unlike the Chicago loitering ordinance, simply do not threaten "innocent conduct." No person can be guilty of fraud unless he specifically intends some harm to his victim. *See United States v. Walker*, 191 F. 3d at 335; *United States v. DiNome*, 86 F. 3d at 283; *United States v. D'Amato*, 39 F. 3d at 1257. Finally, because defendants' vagueness challenge is to a federal statute, no state court ruling limits this court's ability, or its obligation, to construe the challenged law as necessary to ensure due process while preserving to the maximum extent possible the statute's effectiveness. *See Rust v. Sullivan*, 500 U.S. at 190; *United States v. Harris*, 347 U.S. 612, 623 (1954). Under these circumstances, there is no reason to review § 1346 for vagueness except as applied to the facts of defendants' case.

II The Language of 18 U.S.C. § 1346 Can Be Construed to Give Adequate Notice of the Conduct Proscribed

In evaluating defendants' vagueness challenge, my colleagues in both the majority and the dissent conclude, with almost no discussion, that the text of § 1346 offers little assistance. **[Maj. Op. at 21-22]**; **[Dis. Op. at 65]**. I disagree.

The task of interpreting any statute must begin with its language. *See Bailey v. United States*, 516 U.S. 137, 143 (1995); *United States v. Awadallah*, 349 F. 3d 42, 51 (2d Cir. 2003). Although federal law does not specifically define the phrase "the intangible right to honest services," the words are not technical; their common meanings are well understood. *See generally Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992) (relying upon plain meaning to define the word "exclusive"); *Muscarello v. United States*, 524 U.S. 125, 128-32 (1998) (looking to ordinary English usage to discern meaning of "carry" as used in 18 U.S.C. § 924(c)(1)).

Black's Law Dictionary defines a "right" as "[a] legally enforceable claim that another will do or will not do a given act." *Black's Law Dictionary* at 1322 (7th ed. 1999). The same source defines "service" as "[a]n intangible commodity in the form of human effort, such as labor, skill, or advice." *Id.* at 1372. The word "honest" is commonly understood as "free from fraud or deception." *Webster's Third New International Dictionary* 1086 (1986); *see also* 7 *Oxford English Dictionary* 349 (2d ed. 1989) (defining "honest" as "free from fraud"); *Ballantine's Law Dictionary* 566 (3d ed. 1969) (defining "honest" as "descriptive of one who does not lie or cheat"). In sum, "the intangible right to honest services" can fairly be understood to mean a legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception. I am confident that the public and the police can more readily apprehend this concept than a host of others that define criminal

conduct, for example, the concept of vertical and horizontal relatedness that defines a "pattern" of racketeering. *See Bingham v. Zolt*, 66 F. 3d 553, 566 (2d Cir. 1995) (collecting cases rejecting vagueness challenges to "pattern" and "enterprise" elements of racketeering).

Indeed, implicit in the plain meaning of § 1346 are two limiting principles that serve notice on the public and guide the police as to the conduct proscribed. First, the law — whether federal or state, civil or criminal, tort or contract — must recognize an enforceable right to the services at issue. Second, Congress's decision to qualify the word "services" by the modifier "honest" indicates that not every breach of an employment contract or service agreement will support a federal fraud prosecution. What distinguishes "honest services" from the general provision of labor, skill, or advice is that the value of the particular services at issue largely depends on their being performed honestly, that is, without fraud or deception. An employer's right to the honest services of employees entrusted to disburse assets — as in the case of the insurance adjusters in the fraud scheme now before us — is an obvious example of conduct falling within the parameters of § 1346.

Further, when § 1346 is read together with § 1341 and § 1343, three additional elements define and limit the conduct proscribed: a defendant must specifically intend to harm or injure the victim of the fraud scheme; he must misrepresent or conceal a material fact, *see Neder v. United States*, 527 U.S. 1, 22 (1999); and the mails or wires must be used to further the scheme. Together, the five factors sufficed both to alert defendants that their scheme to corrupt insurance adjusters was prohibited by law and to ensure against arbitrary prosecution of the innocent. Where the plain meaning of a statute thus serves adequate notice

of the conduct proscribed, the propriety of its broad sweep is a matter for policy debate. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992).[3]

III. The Majority's Decision to Reaffirm *Handakas* and Require Proof of Detriment in Self-Dealing Cases

The pre-enactment history of § 1346 detailed by the majority reinforces the plain meaning of the statutory text, but I am not convinced that it requires us to reaffirm *United States v. Handakas*, 286 F. 3d 92, or to conclude,

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[3] To the extent our dissenting colleagues also sound a federalism alarm to § 1346, warning that application of the statute to the public sector "invites federal prosecutors to police honesty in the corridors of state government," **[Dis. Op. at 78]**, I am not persuaded that this threatens the Republic. Because § 1346 is not here applied to a public sector fraud, however, I leave further debate on this issue for another day.

Nevertheless, I do question whether the vagueness challenge before us has anything to do with federalism. If courts were to hold "the intangible right to honest services" too vague to satisfy due process in a federal statute, they would presumably be obliged to strike down the same language in state statutes. *See, e.g.*, Ariz. Rev. Stat. § 13-2310(E) (2003) (defining "scheme or artifice to defraud" to include "a scheme or artifice to deprive a person of the intangible right of honest services"); 720 Ill. Comp. Stat. 5/17-24(e)(1)(2003) (defining "scheme or artifice to defraud" to include schemes "to deprive another of the intangible right to honest services"); 720 Ill. Comp. Stat. 5/16H-25(2)(2003) (same, but in the financial institution context); Md. Ann. Code § 8-509 (2002) (making it a crime knowingly and willfully "to defraud a State health plan of the right to honest services"); R. I. Gen. Laws § 19-9-29 (2003) (defining bank fraud to include "a scheme or artifice to deprive another of the intangible right to honest services"). In short, a vagueness ruling would mean no sovereignty, state or federal, could prosecute "honest services" frauds.

To the extent footnote 10 of the majority opinion somewhat cryptically alludes to a federalism argument that "may be more powerful than vagueness alone," I await the clear presentation of such an argument to a particular case before expressing any view as to its availability, let alone its merits.

in this case, in which the statute is applied only to a kickback scheme, that "detriment" must be proved in other cases involving self-dealing frauds.

Section 1346 was enacted in response to *McNally v. United States*, 483 U.S. 350 (1987), in which the Supreme Court overruled decades of decisions by circuit courts, including this one, holding that the mail and wire fraud statutes prohibited schemes to defraud individuals of their rights to honest services, *see id.* at 362-64 & nn.1-4 (Stevens, J., dissenting) (collecting cases).[4] As the majority observes, Congress's use of the definite article to extend fraud protection to "the intangible right to honest services" indicates its intent to restore the right as it had been applied to a host of fraud schemes prior to *McNally*. *See* **[Maj. Op. at 24]**; *see also McNally v. United States*, 483 U.S. at 376 (Stevens, J., dissenting) (observing that *McNally*'s decision to limit mail and wire fraud to property crimes stands virtually alone "against a tide of well-considered opinions issued by state or federal courts," which "correctly understood the intent of the Congress that enacted [the federal fraud] statute[s]").

Surveying the considerable body of pre-*McNally* case law, the majority identifies certain private sector relationships and circumstances where § 1346 clearly applies. Those cases include "a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the person to whom the duty is owed) secretly to act in his or her own interests instead,

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[4] Neither in *McNally* nor in the "honest services" cases that preceded it does a court appear to have ruled that the concept is too vague to permit constitutional application.

accompanied by a material misrepresentation made or omission of information disclosed to the employer." **[Maj. Op. at 3]**. I agree that these types of cases fit comfortably within the plain meaning of § 1346, but I do not understand the court to be limiting the statute's reach to the identified categories.

While a particular relationship may shed light on whether one person owes another honest services, the language of § 1346 indicates that the critical factor is the type of service at issue, not the relationship of the parties. *See United States v. Sancho*, 157 F. 3d 918, 921 (2d Cir. 1998) (per curiam) (holding that what matters is not a fiduciary relationship between the parties, but whether a duty comes within the statutory "right of honest services"). Today's case presents us with honest services fraud in the context of an employer-employee relationship. But a future case may require us to consider whether there is any principled reason to distinguish between an employee and an arms-length contractor when they engage in identical fraud schemes with the specific intent to deprive a victim of services whose value depends upon honest performance — for example, providing a due diligence report, a compliance certification, or an environmental assessment. To the extent *United States v. Handakas*, 286 F. 3d at 102-13, may be interpreted to foreclose the prosecution of a contractor for fraudulently depriving a person of such honest services, I do not join the majority in re-affirming that decision. Rather, I agree with Judge Feinberg that § 1346 was not unconstitutionally vague as applied to the deceit in that case. *Id.* at 115-17 (Feinberg, J., dissenting in part and concurring in part).

Neither do I join the majority in pronouncing that "[i]n the self-dealing context," a § 1346 fraud "must . . . cause, or at least be capable of causing, some detriment — perhaps some economic or pecuniary detriment — to the

employer." **[Maj. Op. at 31]**. The case before us involves only a kickback scheme; the court should await a self-dealing case before deciding whether detriment is necessary to avoid statutory vagueness. *United States v. Lemire*, 720 F. 2d 1327, 1337 (D. C. Cir. 1983), cited by the majority to support a "detriment" requirement, in fact suggests that the crucial determination with respect to detriment is whether a defendant "might reasonably have contemplated" concrete harm to his employer from his failure to disclose self-dealing, a question more of intent than of capability. This distinction could well be significant in a self-dealing case involving an undercover victim. *Lemire* further explains that proof of possible detriment serves to ensure the materiality of a self-dealing defendant's misrepresentations or omissions. *See id.* Because materiality is necessarily fact specific, it would be premature to assume that the element can never be proved beyond a reasonable doubt except by evidence of detriment.

Retaining flexibility to recognize that other schemes, not precisely fitting within the models identified by the majority today, could constitute honest services fraud does not establish the vagueness of § 1346. Rather, it acknowledges the reality of fraud, a crime of extraordinary variety, limited only by human imagination. *See, e.g., United States v. Altman*, 48 F. 3d 96, 102 (2d Cir. 1995) (holding that fraud needs no definition: "it is as old as falsehood and as versable as human ingenuity" (internal quotation marks and citations omitted)).

Whatever other schemes may be prosecuted as honest services frauds in future cases, there is no question that the plain language of § 1346, read together with § 1341 and § 1343, is not unconstitutionally vague as applied to the defendants in this case. Accordingly, I concur in affirming the judgment of conviction.

USA v RYBICKI

00-1043 (L), 00-1044, 00-1052, 00-1055
December 29, 2003

JOHN M. WALKER, JR., *Chief Judge*, and JOSÉ A. CABRANES, *Circuit Judge*, dissenting:

We agree in full with Judge Jacobs' dissenting opinion. We write separately to emphasize and explain that it is the opportunity of *en banc* review that frees us from the Circuit precedents that compelled us in previous cases to apply the statute that we now would hold unconstitutional on its face. *See United States v. Rybicki*, 287 F. 3d 257 (2d Cir. 2002); *United States v. Handakas*, 286 F. 3d 92 (2d Cir. 2002). Indeed, in the *Handakas* opinion, which one of us joined, the panel noted that it was Circuit precedent that compelled application of the "honest services" amendment to the wire and mail fraud statute, 18 U.S.C. § 1346, and stated that "[i]f we were the first panel attempting to discern the meaning of the phrase 'honest services' in § 1346, we would likely find that part of the statute so vague as to be unconstitutional on its face." 286 F. 3d at 104. And in the *Rybicki* opinion, which one of us authored and the other joined, we "agree[d] fully" with that observation of the *Handakas* panel, while noting that we were "bound by this court's precedents upholding convictions under § 1346 that involved schemes[ ] like the one at issue here." 287 F. 3d at 263-64. It is well settled that a panel of this court is "'bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc.'" *BankBoston, N. A. v. Sokolowski*, 205 F. 3d 532, 534-35 (2d Cir. 2000) (*per curiam*) (quoting *United States v. Allah*, 130 F. 3d 33, 38 (2d Cir. 1997)); *see also United States v. Santiago*, 268 F. 3d 151, 154 (2d Cir. 2001).

Now, on *en banc* review, we have the freedom to revisit the larger question of the facial vagueness of § 1346, and we are no more compelled to follow the Circuit precedents dictating our holdings in *Rybicki* and *Handakas* than we are compelled to follow the holdings of those two opinions themselves. Accordingly, we respectfully dissent for the reasons cogently stated by Judge Jacobs.

USA v RYBICKI

00-1043 (L), 00-1044, 00-1052, 00-1055
December 29, 2003

DENNIS JACOBS, *Circuit Judge*, joined by WALKER, *Chief Judge*, CABRANES and PARKER, *Circuit Judges*, dissenting:

I agree with the majority that the appellants likely forfeited their vagueness challenge, and that the issue is one of plain error. The test for plain error is that there must be (i) error, (ii) that is plain, (iii) that affects substantial rights, and (iv) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. This standard is satisfied here, applying the analysis we employed in *United States v. Thomas*, 274 F. 3d 655, 667 (2d Cir. 2001) (in banc). Certainly, conviction under a statute that is unconstitutionally vague on its face is an error of constitutional magnitude. *See United States v. Handakas*, 286 F. 3d 92, 111-12 (2d Cir.), *cert. denied*, 537 U.S. 894 (2002). Reaching the merits, I respectfully dissent because in my view the so-called "honest services" amendment to the wire and mail fraud statute, 18 U.S.C. § 1346, flunks the test for facial vagueness set forth by the Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41 (1999).

I

The test for facial invalidity of a criminal statute was articulated by the Supreme Court in 1999: "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56 (Stevens, *J.*, writing for the Court, joined by Ginsburg and Souter, *JJ.*); *accord id.* at 64-65 (O'Connor, *J.*,

concurring in part and concurring in the judgment, joined by Breyer, *J.*); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The majority opinion states that the governing standard for facial challenges outside of the First Amendment context is to be drawn from *United States v. Salerno*, 481 U.S. 739 (1987), which states in dicta that a statute is facially invalid only if there is "no set of circumstances" in which it would be valid. *Id.* at 745. The majority's expressed preference for the 1987 *Salerno* dicta over the 1999 *Morales* holding is itself a bit of dicta because the majority holds that the statute in question survives scrutiny under either test. **[Maj. Op. at 35]** Although I believe that section 1346 is so vague that there is "no set of circumstances" in which it is clear enough to be applicable, I think that the test does matter, chiefly to assure a sound analysis of constitutional sufficiency. I therefore undertake to demonstrate that the governing test is the one set forth in *Morales*.

At most, four Justices in *Morales* invoked the *Salerno* test for facial vagueness or words suggestive of that standard. *See Morales*, 527 U.S. at 77-81 & nn.1-3 (Scalia, *J.*, dissenting); *id.* at 111-12, 114 (Thomas, *J.*, dissenting, joined by Rehnquist, *C.J.*, and Scalia, *J.*); *id.* at 71 (Breyer, *J.*, concurring in part and concurring in the judgment) ("The ordinance is unconstitutional . . . because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications."). In any event, *Morales* did not implement the *Salerno* dicta. *See id.* at 81 (Scalia, *J.*, dissenting) ("Instead of requiring respondents, who are challenging the ordinance, to show that it is invalid in all its applications, [the Justices in the majority] have required [the government] to show that it is valid in all its applications.").

It is true, of course, that several other propositions discussed in *Morales* only attracted a plurality. As the majority opinion notes, a three-Justice plurality of the *Morales* court would apparently allow challenges for facial vagueness outside of the First Amendment context to criminal laws that both lack a *mens rea* requirement and infringe on constitutional rights. *See id.* at 55 (Stevens, *J.*, writing for the Court, joined by Ginsburg and Souter, *JJ.*); **[Maj. Op. at 11-12]** However, only those same three Justices believed that the ordinance challenged in *Morales* implicated such a constitutional right and lacked a specific intent requirement. Compare *id.* at 55 (Stevens, *J.*, writing for the Court, joined by Ginsburg and Souter, *JJ.*) ("[The challenged statute] is a criminal law that contains no *mens rea* requirement and infringes on constitutionally protected rights.") (internal citations omitted), *with id.* at 66 (O'Connor, *J.*, concurring in part and concurring in the judgment, joined by Breyer, *J.*) ("To be sure, there is no violation of the ordinance unless a person fails to obey promptly the order to disperse. But, a police officer cannot issue a dispersal order until he decides that a person is remaining in one place 'with no apparent purpose' and the ordinance provides no guidance to the officer on how to make this antecedent decision.") *and id.* at 69 (Kennedy, *J.*, concurring in part and concurring in the judgment) (noting that the ordinance "reach[ed] a broad range of innocent conduct" and stating that "[t]he predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance."). Thus, three of the six Justices supporting the result in *Morales* (Justices O'Connor, Kennedy, and Breyer) applied the *Morales* test outside the First Amendment context without regard to whether the statute had an intent requirement or infringed on a constitutional right. Certainly,

none of these propositions nor the invocation of the *Salerno* standard — each attracting only a plurality in *Morales* — constitutes Supreme Court precedent.

The *only* proposition attracting a majority in *Morales* was that a criminal statute that "reach[es] a substantial amount of innocent conduct" and thereby fails to "establish minimal guidelines to govern law enforcement" is, on its face, unconstitutionally vague. *Id.* at 60-61 (Stevens, *J.*, writing for the Court in part V, joined by Ginsburg and Souter, *JJ.*), *id.* at 69 (Kennedy, *J.*, joining in part V, concurring in part and concurring in the judgment); *see also id.* at 64-65 (O'Connor, *J.*, concurring in part and concurring in the judgment, joined by Breyer, *J.*).

We are therefore required to apply *Morales* here. Although the majority holds that section 1346 withstands either test, it is quite clear that the statute imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants. That insufficiency can be illustrated by reference to the cases cited in the majority opinion. As to prosecutors, the majority does not disturb the holding that overturned the conviction in *Handakas*, 286 F. 3d at 96, of a contractor who falsely promised to abide by New York's wage laws, on the ground that the "honest services" amendment was vague as applied. The majority opinion thus confirms that the prosecution in *Handakas* was misguided, or (in my view) that prosecutorial discretion was unguided altogether because the statute insufficiently describes the offense. The majority opinion similarly demonstrates that judges cannot understand what conduct this statute criminalizes. The majority holds that case law predating *McNally v. United States*, 483 U.S. 350 (1987), is relevant to determining the meaning of section 1346 and thus rejects the contrary rule announced in *United States v. Sancho*, 157 F. 3d 918, 922 (2d Cir. 1998) (per curiam); the majority holds that

reasonable foreseeability of non-*de minimis* economic or pecuniary harm is not a necessary element of the crime and thus rejects the panel's contrary holding in *United States v. Rybicki*, 287 F. 3d 257, 265-66 (2d Cir. 2002); and the majority rejects the view expressed in *Handakas* that the statute is facially vague (though that panel was constrained by Circuit precedent from so holding). 286 F. 3d at 104-06. In short, if the statute means what the majority says it means, eight judges in this Circuit failed to understand it in *Sancho*, *Handakas*, and *Rybicki*. Of course, overturned convictions and *in banc* rejection of panel rulings do not prove facial vagueness. But this Circuit's long experience with section 1346 is nevertheless telling evidence that most lawyers and judges, not to speak of ordinary laymen or prospective defendants, cannot be expected to understand the statute.

II

The first question that bears on the vagueness inquiry is whether "a penal statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357. "The plain meaning of 'honest services' in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *Handakas*, 286 F. 3d at 104. The majority opinion is a prolonged and sustained search for some prior settled meaning for an opaque statutory phrase — "the intangible right of honest services" — so that it can be construed as a term of art. That effort to infuse the putative term of art with meaning is conducted in a painstaking way, and considers an abundant variety of alternative meanings. However, a term of art has one single and apparent meaning, in the same way that a pun has two; it is as odd to conduct a scholarly search for the meaning of a term

of art as it would be to hear a pun, conduct research in semantics, etymology and philology for a month, and then laugh.

It may be (as the majority holds) that, in enacting section 1346, Congress intended to reinstate a body of case law that had been overruled by the Supreme Court in *McNally*. *See Handakas*, 286 F. 3d at 103, 104-05 (citing legislative history). But that insight gets us nowhere in terms of limits on prosecutorial power and notice to the public:

> The requirement imposed by the Supreme Court [in *McNally*] to speak more clearly was not for the benefit of the Circuit Courts which had, in fact, given birth to these concepts in the first place. Rather, the requirement . . . was for the benefit of the public, the average citizen, . . . who must be forewarned and given notice that certain conduct may subject him to federal prosecution.

United States v. Brumley, 116 F. 3d 728, 745-46 (5th Cir. 1997) (*in banc*) (Jolly, *J.*, dissenting) (emphasis added). A statute is unconstitutionally vague unless it provides a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *United States v. Strauss*, 999 F. 2d 692, 697 (2d Cir. 1993) (internal quotation marks omitted). We have held that notice is insufficient if lay persons are required to "perform[ ] the lawyer-like task of statutory interpretation by reconciling the text of [ ] separate documents." *Chatin v. Coombe*, 186 F. 3d 82, 89 (2d Cir. 1999) (invalidating a prison administrative prohibition as unconstitutionally vague as applied). Construing a statute (as the majority does here) to say that scores of overruled cases are hereby revived, requires lay persons to do lawyer-like tasks that few lawyers would have the skills to perform:

> [N]o one can know what is forbidden by § 1346 without undertaking the "lawyer-like task" of answering the following questions: [1] Can pre-*McNally* case law be consulted to illuminate the wording of § 1346? [2] Can any meaning be drawn from the case law, either the uneven pre-*McNally* cases or the few cases decided post-§ 1346? [3] Is one to be guided only by case law within one's own circuit, or by the law of the circuits taken together (if that is possible)?

Handakas, 286 F. 3d at 105.

It is remarkable how little the majority's search for meaning has turned up. The term of art for which meaning is sought is essentially the entire mouthful of the statute: "scheme or artifice to deprive another of the intangible right of honest services." Before *McNally*, this phrase encompassed four "categories" of honest-services cases:

> [1] government officials who defraud the public of their own honest services; [2] elected officials and campaign workers who falsify votes and thereby defraud the electorate of the right to an honest election; [3] private actors who abuse fiduciary duties by, for example, taking bribes; and [4] private actors who defraud others of certain intangible rights, such as privacy.

Id. at 101-02 (citing *McNally*, 483 U.S. at 362-64 nn.1-4). Yet the majority's search for meaning bears upon no more than one subgroup of the four categories of honest-services cases.

Following an exhaustive, scholarly analysis, my colleagues conclude that one of these four categories of conduct criminalized by pre-*McNally* case law — the theft of privacy rights — cannot be revived as a criminal offense, presumably because the statute would be unconstitutionally vague under *Salerno* as well as *Morales*

if so applied. **[Maj. Op. at 25 n.13]** *Contra United States v. Condolon*, 600 F. 2d 7, 8-9 (4th Cir. 1979); *United States v. Louderman*, 576 F. 2d 1383, 1387-88 (9th Cir. 1978). They also limit their search for meaning to cases of "honest services" fraud in the private sector. No attempt is made (advisedly) to describe the prohibition, if any, in the two remaining categories of public sector "honest services" fraud criminalized in the pre-*McNally* case law; any "well-settled meaning" relating to these remaining categories will presumably be supplied — or looked for — later.

The majority intuits a statutory meaning that is insufficient even to describe the subgroup of private sector cases. Where kickbacks or bribery are involved, the majority holds that a "scheme or artifice to deprive another of the intangible right of honest services" means:

> a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

[Maj. Op. at 31-32] However, in cases of self-dealing, there "may" be an additional requirement that the alleged conduct "caused, or at least was capable of causing, some detriment" to the employer. **[Maj. Op. at 32]** (emphasis added). The tentativeness of the majority's approach is well justified: a number of pre-*McNally* cases hold that there is no such requirement of economic detriment. *See, e.g.*, *United States v. Bronston*, 658 F. 2d 920, 927 (2d Cir. 1981) (upholding mail fraud conviction against a law firm partner paid for representing a client in contract negotiation

despite firm representing competing bidder); *see also Rybicki*, 287 F. 3d at 262 ("[I]t was well-settled law both before and after *McNally* that the government does not have to establish that a scheme to defraud was successful or resulted in any actual [economic] harm to the victim."). **[Maj. Op. at 31 n.16]** The majority deems such cases "atypical," however. They may be atypical; but even assuming that a term of art can be distilled from the body of case law that was overruled in *McNally*, surely no unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from some pre-*McNally* cases provided that *other* pre-*McNally* cases are ignored, particularly since the designation of overruled cases that are in and those that are out is itself essentially arbitrary. Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project.

The majority claims that any ambiguity is of no concern here because defendants' conduct falls "squarely within the meaning of 'scheme or artifice to deprive another of the intangible right of honest services' as distilled from the pre-*McNally* private sector cases." **[Maj. Op. at 32-33]** But this argument is no answer to a *facial* challenge for vagueness. The only relevant question is whether "ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357.

It is only too obvious that there is no settled meaning to the phrase "the intangible right of honest services" that is capable of providing constitutionally adequate notice. If there were, the judges and prosecutors in this Circuit would certainly know it. Yet, the majority overrules the holding (erroneously characterized as dicta) in *Sancho*, 157 F. 3d at 922, that pre-*McNally* case law is irrelevant to

determining the meaning of section 1346 — *i.e.*, that "the intangible right of honest services" lacks a well settled meaning. The majority also concludes that the panel opinion in this case was wrongly decided insofar as it held that one element of a section 1346 offense is that a loss of money or property be reasonably foreseeable. *See Rybicki*, 287 F. 3d at 265-66. Finally, the majority preserves the holding of *Handakas*, 286 F. 3d at 96, which means that the prosecutors in the Eastern District of New York did not understand what the statute meant. How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?

III

The second question that bears on facial vagueness is whether the "legislature [has] establish[ed] minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. This second inquiry is "the more important" of the two, and is alone sufficient to decide constitutional infirmity. *Id.* at 358, 361 & n.10. The governing test is whether the statute "permit[s] 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (second alteration in original). "An enactment fails to provide sufficiently explicit standards for those who apply it when it impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis." *Handakas*, 286 F. 3d at 107 (internal quotation marks and citations omitted). Thus, a statute is facially vague if it "necessarily entrusts lawmaking to the moment-to moment judgment" of law enforcement. *Morales*, 527 U.S. at 60 (Stevens, *J.*, writing for the majority) (internal quotation marks omitted).

The majority opinion affirms the result in *Handakas*, which means (as I pointed out earlier) that the prosecutors in the Eastern District of New York did not understand what the statute meant. Moreover, the meaning supplied by the majority to uphold this use of section 1346 is as elusive as the statute itself. According to the majority, the "honest services" offense is a misrepresentation or omission that (i) is made by a private person who secretly acts in self-interest while purporting to act in the interests of the employer and (ii) is capable of leading a reasonable employer to change its conduct (*i.e.*, it is "material"). **[Maj. Op. at 31-32]** Neither requirement limits prosecutorial discretion.

No limit is placed on the exercise of prosecutorial discretion by requiring a showing that an employee secretly prefers her own interest to the interest of the employer; it is naive to assume that this preference is not the most common premise of private employment. "[R]elationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than abstract satisfaction of receiving 'honest services' for their own sake." *United States v. Frost*, 125 F. 3d 346, 365 (6th Cir. 1997). Every salaried employee can be said to work for her own interest while purporting to act in the interests of the employer. Yet the majority opinion effectively makes "dishonesty by an employee, standing alone, [ ] a crime." *Id.* at 368.

Nor is prosecutorial discretion limited by the "materiality" requirement *See United States v. Sun-Diamond Growers*, 138 F. 3d 961, 973 (D. C. Cir. 1998) ("Every material act of dishonesty by an employee deprives the employer of that worker's 'honest services,' yet not every such act is converted into a federal crime by the mere use of the mails or interstate phone system."); *Frost*, 125 F. 3d at 365 (in rejecting the materiality test: "[I]f a 'change in business conduct' occurs under the materiality standard when a

business alters its behavior merely to avoid the appearance of impropriety . . ., the intangible right to honest services doctrine may lack substantive limits in the private sector.") (emphasis in original).

The majority codifies a doctrine that is as standardless as the statute itself. Nothing in the majority opinion prevents criminalization of any of the following conduct: a regulated company that employs a political spouse; an employee who violates an employee code of conduct; a lawyer who provides sky-box tickets to a client's general counsel; a trustee who makes a self-dealing investment that pays off; or an officeholder who has made a decision in order to please a constituent or contributor, or to promote re-election, rather than for the public good (as some prosecutor may see the public good).

The majority is unconcerned with the standardless sweep of the statute because supposedly there is "a wide swath of behavior" for which the prohibitions of section 1346 are "clear." **[Maj. Op. at 35]** This statement turns upside down the *Morales* test for facial vagueness: whether a statute reaches a wide swath of behavior that no one (yet) deems criminal and fails to provide minimal guidance to law enforcement. *See Morales*, 527 U.S. at 60 (Stevens, *J.*, writing for the majority). "'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Kolender*, 461 U.S. at 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). I share the confidence implicit in the majority opinion that prosecutors in this Circuit and the Attorney General under whom they serve can be trusted to avoid any

systematic abuse of such a statute; but we should construe this statute so that it serves to bind those who nevertheless may need constraint.[1]

IV

The majority opinion's search for a meaning of art leans heavily on the overruled pre-*McNally* case law of other circuits. But "[e]ven the circuits that have reinstated pre-*McNally* law recognize that *ad hoc* parameters are needed to give the statute shape." *Handakas*, 286 F. 3d at 109 (collecting cases). Although a number of circuits have upheld section 1346 against a claim of facial vagueness, there is now wide disagreement among the circuits as to the elements of the "honest services" offense. These opinions, taken together, refute rather than support the idea that section 1346 has any settled or ascertainable meaning or that the offense it describes has known contours:

- What *mens rea* must be proved by the government? The majority follows Second Circuit precedent in holding that an intent to cause economic harm is not required — a defendant need only have intended to deprive another of the "intangible right of honest services." **[Maj. Op. at 37-38]** However, in the Seventh

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[1] The majority ultimately relies on the reductionist argument that these defendants must have known that it would be illegal "to use the wires and the mails . . . to pay off insurance adjustors." **[Maj. Op. at 33]** The natural drift of this observation is that the scheme inflated the settlement of claims to the benefit of the defendants' clients and to the detriment of the insurance companies. However, the government never contended that this occurred. As the majority opinion recites, "the government acknowledged that it would not seek to prove that the amount of any of the settlements connected with a payment to an adjuster had been inflated above what would have been a reasonable range for that settlement." **[Maj. Op. at 5]** There was certainly no reason for these defendants to believe that the gratuities at issue — which the government never contended caused a loss — amounted to a federal mail or wire fraud violation.

Circuit, an intent to achieve personal gain is an element of the offense. *See United States v. Bloom*, 149 F. 3d 649, 656-57 (7th Cir. 1998). But *see United States v. Welch*, 327 F. 3d 1081, 1106-07 (10th Cir. 2003) (holding that the text and structure of the mail fraud statutes do not support "adding an element" to "honest services" fraud requiring that defendant seek to obtain a personal benefit). The Eighth Circuit describes the *mens rea* element as "caus[ing] or intend[ing] to cause actual harm or injury, and in most business contexts, that means financial or economic harm." *See United States v. Pennington*, 168 F. 3d 1060, 1065 (8th Cir. 1999). One circuit has held that, to secure an honest services conviction, "[t]he prosecution must prove that the employee intended to breach a fiduciary duty." *Frost*, 125 F. 3d at 368. Other circuits merely require a showing of "fraudulent intent." *See United States v. Cochran*, 109 F. 3d 660, 667 (10th Cir. 1997); *United States v. Jain*, 93 F. 3d 436, 442 (8th Cir. 1996).

- Must the defendant have caused actual tangible harm? *Compare Jain*, 93 F. 3d at 442 ("When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible 'rights' have been violated."), with *Frost*, 125 F. 3d at 369 ("[A] defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim."). Some circuits have required that the misrepresentation be material, *i.e.*, that the employee have reason to believe that the information would lead a reasonable employer to change its business conduct. *See Cochran*, 109 F. 3d at 667 & n.3; *United States v. Gray*, 96 F. 3d 769, 775 (5th Cir. 1996); *Jain*, 93 F. 3d at 442. Other circuits only require a showing that it was reasonably foreseeable for the victim to suffer economic harm.

Frost, 125 F. 3d at 368; *Sun-Diamond Growers*, 138 F. 3d at 973-74. We adopted this last requirement in the *Rybicki* panel opinion, and now abandon it. *See Rybicki*, 287 F. 3d at 265.

- What is the *duty* that must be breached to violate section 1346? The majority holds that it is the duty owed by an employee to an employer, or by "a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers" (whatever that means). **[Maj Op. at 31]** Some circuits only allow prosecutions for breach of an employee's duty to an employer. *See, e.g.*, *Brumley*, 116 F. 3d at 735. Other circuits require the breach of a fiduciary duty. *See Frost*, 125 F. 3d at 366, 368; *Sun-Diamond Growers*, 138 F. 3d at 974.

- Is the source of that duty state or federal law? The majority does not say, and other circuits are split. *Compare Frost*, 125 F. 3d at 366 ("*Federal* law governs the existence of fiduciary duty under the mail fraud statute." (emphasis added)), *with Brumley*, 116 F. 3d at 735 ("We have held that services under § 1346 are those an employee must provide the employer under *state law*." (emphasis added)).

- Did section 1346 revive pre-*McNally* case law; if so must each circuit look to its own governing precedent or to some set of rules distilled from the whole body of pre-*McNally* cases? *See Brumley*, 116 F. 3d at 733-34 (looking to "plain language" of a statute to discern its "meaning" because "before *McNally* the doctrine of honest services was not a unified set of rules [a]nd Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion"); Frost, 125 F. 3d at 364, 365 (holding that "§ 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to previous

> opinions interpreting the intangible right to honest services" and looking to "Sixth Circuit precedent issued before *McNally* in order to discover the precise contours of the right in this circuit"). In *Sancho*, we held that pre-*McNally* cases could not be considered in determining the meaning of the statute. *See* 157 F. 3d at 921-22. We now overrule *Sancho* and adopt an approach divining statutory meaning by analyzing cases overruled by *McNally* as a whole.

In sum, the circuits are fractured on the basic issues: (1) the requisite *mens rea* to commit the crime, (2) whether the defendant must cause actual tangible harm, (3) the duty that must be breached, (4) the source of that duty, and (5) which body of law informs us of the statute's meaning. This lack of coherence has created "a truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit." *Brumley*, 116 F. 3d at 743 n.7 (Jolly, *J.*, dissenting).

V

As the foregoing section documents, the vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge. The felt need to do that attests to the constitutional weakness of section 1346 as written. And the result of all these efforts — which has been to create different prohibitions and offenses in different circuits — confirms that the weakness is fatal. Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to "intentionally cause harm to another," or to "stray from the straight and narrow," or to fail to render "honest services."

"[L]egislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Handakas*, 286 F. 3d at 101 (punishment for "constructive offenses" violates the Due Process Clauses of the Fifth and Fourteenth Amendments, which "require the legislature to specify the elements of criminal offenses"); *Bloom*, 149 F. 3d at 654 (describing "a federal common-law crime" as "a beastie that many decisions say cannot exist"). As the splintering among the circuits demonstrates, section 1346 effectively imposes upon courts a role they cannot perform. When courts undertake to engage in legislative drafting, the process takes decades and the work is performed by unelected officials without the requisite skills or expertise; and as the statutory meaning is invented and accreted, prosecutors are unconstrained and people go to jail for inchoate offenses.

The majority complacently cites by analogy similarly vague words in the Sherman Act that make unlawful any "restraint of trade." **[Maj. Op. at 23]** The Sherman Act predates *Morales* by a century. Moreover, the comparison proves too much. Courts construe the Sherman Act primarily as a civil and regulatory statute, and criminal Sherman Act prosecutions have long been limited essentially to price-fixing. In keeping with its exceptional history, courts have broadly construed the Sherman Act as "a charter of freedom" akin to constitutional provisions. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978) ("Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'") (citation omitted)); 2 Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, Antitrust Law § 303b4, at 33 (2d ed. 2000) ("Because they were usually dealing with civil proceedings, the courts have implicitly understood the Sherman Act as a mandate to develop a common law of antitrust — as indeed it would

have to be in order to fulfill its purpose as a 'charter of freedom.'"). The analogy to antitrust law is valid only insofar as section 1346 is an invitation by Congress for courts to develop a common law of criminal punishment.

Finally, "[t]he absence of discernible standards in the 'honest services' doctrine implicates principles of federalism." *Handakas*, 286 F. 3d at 110. The majority opinion in effect criminalizes all material acts of dishonesty by employees or by persons who owe analogous duties. While the majority opinion concerns itself only with private sector "honest services" fraud, there seems to be no principled basis in the statute's wording or in (overruled) cases for excluding from section 1346's reach services rendered in the public sector. Thus, without any obvious limiting principles, the majority opinion invites federal prosecutors to police honesty in the corridors of state government by invoking section 1346 against state employees for their acts of "honest services" fraud. This construction of section 1346 undoubtedly "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360.

I believe that Congress has not heeded the Supreme Court's admonition to "speak more clearly than it has." *See id.* We should not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000).

The majority opinion exhibits deference to Congress by conscientiously seeking to understand congressional intent, and the effort and product are scholarly and scrupulous. But the work accomplished by the majority opinion, which is admirable in its way, is properly the work of legislators in statutory drafting and the work of the executive in framing prosecutorial standards.

"If the words of a criminal statute insufficiently define the offense, it is no part of deference to Congress for us to intuit or invent the crime." *Handakas*, 286 F. 3d at 109-10. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2000

(Argued December 4, 2000 Decided April 22, 2002)

Docket Nos. 00-1043(L), 00-1044(CON), 00-1052(XAP), 00-1055(CON).

----------X

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

– v. –

THOMAS RYBICKI, FREDRIC GRAE, GRAE, RYBICKI & PARTNERS, P.C.,

Defendants-Appellants-Cross-Appellees.

----------X

Before: WALKER, *Chief Judge*, CABRANES and STRAUB, *Circuit Judges*.

Appeal from the judgments of the United States District Court for the Eastern District of New York (Carol Bagley Amon, *District Judge*) convicting appellants of mail and wire fraud and conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 371, based on their practice of making payments through middlemen or expediters to insurance company adjusters in order to obtain favorable settlements in personal injury lawsuits.

AFFIRMED.

BARRY E. SCHULMAN, Law Office of Barry E. Schulman, (Deborah A. Santelmo on the brief), Brooklyn, NY, *for Defendant-Appellant-Cross-Appellee Rybicki.*

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JOHN M. WALKER, JR., *Chief Judge.*

Defendants-appellants Thomas Rybicki, Fredric Grae, and the law firm of Grae, Rybicki & Partners, P.C. appeal from the January 27, 2000 judgments of the district court, following a jury trial, convicting them of mail and wire fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 371, based on their practice of making payments through middlemen or expediters to insurance company adjusters in return for more favorable settlements in personal injury lawsuits.

Following an eight-week trial, the jury returned a verdict of guilty against each defendant on twenty counts of mail fraud, in violation of 18 U.S.C. § 1341, two counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Appellants Grae and Rybicki were each sentenced by the district court to terms of imprisonment of one year and one day, three years of supervised release, a $20,000 fine, and a $1,150 special assessment. The district court stayed appellants' surrender pending appeal. Appellant Grae, Rybicki & Partners, P.C. was sentenced to three years' probation, an $80,000 fine, and a $4,600 special assessment.

On appeal, appellants raise a host of legal and factual challenges to their convictions. Most of these claims are disposed of by a summary order issued simultaneously with this opinion. We write here only to address appellants' argument that because the government failed to prove that the appellants intended to cause or actually caused economic or pecuniary harm to the victim insurance companies, there was insufficient evidence to establish that their practice of using an intermediary to expedite the settlement of personal injury claims through an insurance company adjuster with whom the intermediary shared his fee constituted a "scheme or artifice to defraud" within the meaning of 18 U.S.C. §§ 1341 and 1346.

We hold that in order to convict a defendant based upon a scheme to defraud another of the intangible right of honest services, as contemplated by 18 U.S.C. § 1346, it is unnecessary to prove that the defendant intended economic or pecuniary harm or that any such harm actually resulted from the fraud. All that is required is proof (1) that the defendant engaged in a scheme to defraud; (2) with the intent to deprive another of the intangible right of honest services; (3) that it was reasonably foreseeable to the defendant that the scheme could result in some economic or pecuniary harm to the victim that is more than *de minimis;* and (4) that the mails or wires were used in furtherance of the scheme. The evidence in this case supported such a finding by the jury, and, therefore, appellants' convictions are affirmed.

BACKGROUND

Because appellants challenge the sufficiency of the evidence to support their convictions, "we review all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States*

v. Walker, 191 F.3d 326, 333 (2d Cir. 1999) (internal quotation marks omitted). Viewed in this light, the evidence at trial established the following.

Appellants are two Staten Island personal injury attorneys and their law firm. In order to obtain favorable results, either as to timing or amount, in settling the personal injury claims of their clients with the opposing insurance companies, appellants would offer a kickback to a middleman or intermediary who would approach the adjuster of the pertinent insurance company and arrange the settlement. It was understood by all concerned that the payments made to the middlemen, generally a percentage of the total settlement amount, would be shared equally between the middlemen and the adjusters. Although each of the insurance companies that employed the adjusters had written policies that prohibited the adjusters from accepting any gifts or fees and required them to report the offer of any gifts or fees, the payments offered to the adjusters were accepted by them but were not reported to their employers. Moreover, the participants of the conspiracy, including Grae and Rybicki, took considerable steps to disguise and conceal the payments made to the middlemen and the adjusters. Appellants were shown to have made payments to adjusters in at least twenty cases that settled for an aggregate of $3,000,000 between 1991 and 1994.

At the outset of trial, the government acknowledged that it would not seek to prove that the amount of any of the settlements had been inflated above what would have been a reasonable range for that settlement. It maintained, however, that the settlements were necessarily inflated above the amount that the appellants' clients, personal injury plaintiffs (the "PI Plaintiffs"), would have been willing to accept by at least the amount paid to the middlemen and adjusters, since these amounts did not go

to the PI Plaintiffs. The government also established the jurisdictional requisite of use of the mails and wires through evidence of phone calls made by the appellants to implement the settlements, settlement statements mailed by the appellants to the insurance companies, settlement checks (the fruits of the scheme) that the insurance companies mailed to the appellants, several payments that were invoiced and paid by mail, and mandatory filings, adulterated to conceal the payments, that were mailed to the New York State Office of Court Administration ("OCA").

The government's proof at trial included testimony from three of the middlemen involved in the scheme, including one who had formerly been an insurance company adjuster and had dealt with Grae in that capacity as well, and an insurance company adjuster who had accepted payments to settle cases involving the Grae & Rybicki firm. Victim insurance company representatives testified that the payments accepted by their adjusters violated internal company policies. The government also introduced wiretap evidence of Grae and Rybicki arranging the settlements of personal injury cases, together with ledgers and records kept by three middlemen that reflected the pay-offs.

DISCUSSION

The mail and wire fraud statutes criminalize the use of the mails and wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. § 1341 (mail fraud statute); *see also* 18 U.S.C. § 1343 (wire fraud statute). Appellants' convictions were grounded on 18 U.S.C. § 1346, which provides as follows:

Definition of "scheme or artifice to defraud"

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Congress enacted this provision in 1988 to expand the definition of "scheme or artifice to defraud" in response to *McNally v. United States,* in which the Supreme Court held that the mail fraud provision and, by necessary implication, the wire fraud provision were "limited in scope to the protection of property rights." 483 U.S. 350, 360 (1987); *see United States v. Covino,* 837 F.2d 65, 71 (2d Cir. 1988) (noting that because mail and wire fraud provisions are construed identically, *McNally* applies to wire fraud as well). In so doing, the Court reversed a conviction involving the deprivation of honest services of a public official on the ground that there had been no allegation that the scheme at issue involved the deprivation of money or property. *Id.* at 360-61, 107 S.Ct. 2875.

Prior to *McNally,* most circuits had recognized the applicability of § 1341 to frauds involving "intangible rights," including honest services frauds: "In the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions [were] found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information." *McNally,* 483 U.S. at 363 (Stevens, J., dissenting). Congress enacted § 1346 in response to *McNally* and reinstated the "intangible rights" doctrine. *See United States v. Schwartz,* 924 F.2d 410, 416-17 & n.2, 418-19 (2d Cir. 1991) (discussing purpose of § 1346 and its impact on *McNally* and pre-*McNally* law); *see also United States v. Frost,* 125 F.3d 346, 364 (6th Cir. 1997) (noting that every circuit to have addressed the question has held that § 1346 overruled *McNally*).

Notwithstanding the passage of § 1346, appellants argue that a conviction for honest services fraud under §§ 1341 and 1343 still requires proof of actual or intended economic or pecuniary harm to the victim-proof, they assert, was lacking in this case. We reject this effort to impose the rule enunciated in *McNally* on a conviction for honest services fraud. Such a reading would vitiate § 1346 and would contravene Congress's clear intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another.

Not surprisingly, no Second Circuit case construing § 1346 supports appellants' argument. Rather, appellants rely almost exclusively on cases that applied the *McNally* standard to conduct that occurred before the effective date of § 1346. *See, e.g., United States v. DiNome,* 86 F.3d 277, 283-85 & n.5 (2d Cir. 1996) (applying *McNally* to pre-§ 1346 conduct, but affirming conviction based on deprivation of information material to victim's economic decisions); *United States v. Mittelstaedt,* 31 F.3d 1208, 1216-18 (2d Cir. 1994) (applying *McNally* standard to reverse counts based on pre-§ 1346 conduct, but affirming count based on post-§ 1346 conduct); *United States v. Miller,* 997 F.2d 1010, 1016-20 & n.5 (2d Cir. 1993) (noting that § 1346 is inapplicable to conduct that pre-dated the statute's effective date and applying *McNally*); *Schwartz,* 924 F.2d at 416-17 & n.2, 418-19 (holding that § 1346 does not apply retroactively and applying *McNally* standard to conduct at issue); *Covino,* 837 F.2d at 70-71 (reversing conviction for pre-§ 1346 conduct based on *McNally*).

Our § 1346 cases have made clear, however, that the only intent that need be proven in an honest services fraud is the intent to deprive another of the intangible right of honest services. *See United States v. Sancho,* 157 F.3d 918, 921 (2d Cir. 1998) (*per curiam*) ("The essential element of

a violation of § 1343, incorporating § 1346, is a scheme to deprive another of the 'intangible right of honest services.' "); *see also Walker,* 191 F.3d at 335 (noting that element of specific intent to harm required by § 1341 can be satisfied by proof that defendant's mail fraud scheme was intended "to deprive its victims of 'the intangible right of honest services' "); *United States v. Altman,* 48 F.3d 96, 101 (2d Cir. 1995) (purpose of mail fraud scheme must be either obtaining money or property or depriving another of the right of honest services).

Appellants also argue that even if an intent to cause economic harm is not a required element of an honest services fraud, some economic harm must, in any event, result from the fraud. They point to the government's alleged concession that all of the personal injury claims here were settled for fair value to argue that no actual harm occurred in this case. This reading of § 1341 does not even conform to the rule announced in *McNally:* it was well-settled law both before and after *McNally* that the government does not have to establish that a scheme to defraud was successful or resulted in any actual harm to the victim. *See Walker,* 191 F.3d at 335; *DiNome,* 86 F.3d at 283; *United States v. D'Amato,* 39 F.3d 1249, 1257 (2d Cir. 1994) (citing *Durland v. United States,* 161 U.S. 306, 315 (1896)); *Mittelstaedt,* 31 F.3d at 1216 (citing *United States v. Wallach,* 935 F.2d 445, 461 (2d Cir. 1991)); *United States v. Starr,* 816 F.2d 94, 98 (2d Cir. 1987). Rather, the only significance in a fraud case of proof of actual harm befalling the victim as a result of the scheme is that it may serve as circumstantial evidence from which a jury could infer the defendant's intent to cause harm. *See United States v. Guadagna,* 183 F.3d 122, 130 (2d Cir. 1999) (" '[W]hen the "necessary result" of the . . . scheme is to injure others, fraudulent intent may be inferred from the scheme itself.' ") (quoting

D'Amato, 39 F.3d at 1257) (second alteration in original); *see also United States v. McDonough,* 56 F.3d 381, 391 (2d Cir. 1995).

In short, we hold that, in proving "a scheme or artifice to deprive another of the intangible right of honest services" as the object of mail or wire fraud, the government need not prove either that the defendant intended to cause the victim economic or pecuniary harm or that such harm actually resulted from the scheme to defraud.[1]

Appellants next argue that § 1346's expansion of the definition of a "scheme or artifice to defraud" to include a scheme or artifice to deprive another of "the intangible right of honest services" is unconstitutionally vague. Where there is a vagueness challenge to a statute that does not involve First Amendment freedoms, the statute must be evaluated on an "as applied" basis. *See, e.g., United States v. Whittaker,* 999 F.2d 38, 42 (2d Cir. 1993). Such a criminal statute is not impermissibly vague if it provides explicit standards for those who apply it and gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *See, e.g., United States v. Schneiderman,* 968 F.2d 1564, 1568 (2d Cir. 1992), *abrogated on other grounds, Posters 'N' Things v. United States,* 511 U.S. 513 (1994); *see also United States v. Bohonus,* 628 F.2d 1167, 1173 (9th Cir. 1980) ("To withstand a vagueness challenge, a criminal statute must be reasonably specific."). In addition, a statute's requirement that a specific intent be proven may prevent even a broadly framed standard of conduct from being held to

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[1] We do not rule out the possibility that the government in this case could have established actual or intended economic or pecuniary harm had it been required to do so.

be impermissibly vague. *See, e.g., United States v. Margiotta,* 688 F.2d 108, 129 (2d Cir. 1982); *Bohonus,* 628 F.2d at 1174-75.

Vagueness challenges to the application of § 1346 and honest services fraud to similar conduct have been rejected by this and other circuits. *See, e.g., United States v. Frega,* 179 F.3d 793, 798, 803 (9th Cir. 1999) (rejecting vagueness challenge by an attorney convicted under § 1346 for bribing state court judge); *Frost,* 125 F.3d at 352, 370-71 (same in the context of university professor who helped students to obtain degrees by fraud in exchange for their influence in obtaining government contracts); *United States v. Gray,* 96 F.3d 769, 772, 776-77 (5th Cir. 1996) (same in the context of basketball coaches who helped students obtain academic eligibility by fraud); *United States v. Castro,* 89 F.3d 1443, 1447-48, 1455 (11th Cir. 1996) (same in the context of attorneys who paid kickbacks to state court judges to obtain appointments as public defenders); *United States v. Bryan,* 58 F.3d 933, 937-38, 941-43 (4th Cir. 1995) (same in the context of lottery director who abused his position to manipulate award of advertising contract), *abrogated on other grounds, United States v. O'Hagan,* 521 U.S. 642 (1997); *see also Margiotta,* 688 F.2d at 112, 129 (rejecting vagueness challenge to honest services prosecution under § 1341 for abuse of political position by distributing insurance commissions to political associates); *Bohonus,* 628 F.2d at 1167, 1172-75 (same in context of abusing managerial authority over contract to extort kickbacks).

A panel of this court, however, recently upheld a vagueness challenge to § 1346 in the context of a bid contractor working for a state school authority who wilfully breached a contract requirement that he pay the prevailing wage to his employees. *See United States v. Handakas,* ___ F.3d ___, ___, 2002 WL 449536, at *1-*2

(2d Cir. Mar. 22, 2002). After reviewing the language and history of § 1346, the panel concluded that the phrase "honest services" was too vague to give notice to a person of ordinary intelligence that a "breach of contract could subject one to a mail fraud conviction." *Id.* at *13.

While we agree fully with the *Handakas* panel's observations concerning the vagueness of the phrase "honest services," *see id.* at *7-*17, *Handakas* does not aid appellants in this case. As *Handakas* itself observed, we are bound by this court's precedents upholding convictions under § 1346 that involved schemes, like the one at issue here, in which the defendant breached or induced the breach of a duty owed by an employee or agent to his employer or principal that was enforceable by an action at tort. *See id.* at *12. For example, in *Sancho* we affirmed the conviction of a real estate developer who, in seeking to obtain a multi-million dollar letter of credit from a construction company to secure a construction loan, agreed to bribe the person he believed to be the company's financial consultant to induce the consultant not to disclose to the company that the letter of credit would be invested in a sham financing program. *See Sancho,* 157 F.3d at 919. In *United States v. Middlemiss* we affirmed a § 1346 conviction in which a New York Port Authority employee used his position to obtain a cafeteria lease for a company in which he had an undisclosed financial interest. *See* 217 F.3d 112, 120 (2d Cir. 2000).

In light of *Sancho* and *Middlemiss,* we see no basis for finding § 1346 vague as applied to this case given that appellants are sophisticated attorneys who were presumptively aware that their payments to insurance adjusters to expedite claims created improper conflicts of interest for the adjusters with respect to their employers. In addition, appellants' efforts to avoid detection, such as omitting required information on OCA filings and failing

to record the bribes in any of their financial documentation, are indicative of consciousness of guilt, *see, e.g., Bryan,* 58 F.3d at 942-43; *United States v. McDonough,* 56 F.3d 381, 391 (2d Cir. 1995), thereby negating appellants' claim that they had no notice their conduct was illegal.

While we do not find that § 1346, as applied in this case, is unconstitutionally vague, we agree with appellants that because the statute does not define honest services, the potential reach of § 1346 is virtually limitless. *See Frost,* 125 F.3d at 368-69 (discussing potential breadth of statute and "need to avoid the over-criminalization of private relationships"). As we have noted, "not every breach of an employee's fiduciary duty to his employer constitutes mail or wire fraud." *United States v. Carpenter,* 791 F.2d 1024, 1035 (2d Cir. 1986), *aff'd,* 484 U.S. 19 (1987); *see also United States v. Sun-Diamond Growers,* 138 F.3d 961, 973 (D.C. Cir. 1998) (making same observation with respect to violations of § 1346). For example, a customer who importunes an employee to allow her to use the company's telephone access code to make an important long-distance telephone call, in the face of a written company policy expressly prohibiting non-employees from using the access code, could conceivably fall within the scope of the statute if read literally. So too could an employee's use of his company's letterhead to lend authority to a letter of complaint mailed to the employee's landlord in disregard of the company's code of conduct prohibiting the use of the company's letterhead for non-company business.

Several circuits, addressing this concern, have interpreted "scheme or artifice to deprive another of the intangible right of honest services" in such a way as to properly curtail the statute's reach. *See, e.g., id.* (recognizing "the risk that federal criminal liability could metastasize" if § 1346 were read too broadly); *Frost,* 125 F.3d at 365-69 (noting breadth of literal terms of § 1346 and discussing various

approaches to defining reach of statute); *United States v. Cochran,* 109 F.3d 660, 667 (10th Cir. 1997) (observing that "it would give [the court] great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing"); *United States v. Czubinski,* 106 F.3d 1069, 1077 (1st Cir. 1997) (noting that Congress did not enact § 1346 "to create what amounts to a draconian personnel regulation"); *United States v. Jain,* 93 F.3d 436, 441-42 (8th Cir. 1996) (discussing problems with extending "honest services" doctrine to private sector); *cf. United States v. Sawyer,* 85 F.3d 713, 728 (1st Cir. 1996) (holding, in context of misconduct by state government employees, that "[t]o allow every transgression of state governmental obligations to amount to mail fraud would effectively turn every such violation into a federal felony; this cannot be countenanced").

Some courts have imposed a requirement that the misrepresentation or omission at issue be "material," such that "an employee has reason to believe the information would lead a reasonable employer to change its business conduct." *Gray,* 96 F.3d at 775 (internal quotation marks omitted); *see also Cochran,* 109 F.3d at 667 (requiring a showing of materiality); *Jain,* 93 F.3d at 441-42 (same). The First Circuit has at times adopted a requirement that the deprivation of honest services must either result in some articulable harm to the victim or be intended for some gainful, though not necessarily economic, use to the defendant. *See United States v. Jordan,* 112 F.3d 14, 19 (1st Cir. 1997); *Czubinski,* 106 F.3d at 1077 (reversing conviction based on defendant's unauthorized accessing of confidential tax records where there was no showing that defendant intended to disclose or otherwise use the confidential information for personal gain). Finally, several circuits have adopted a requirement that it must have been reasonably foreseeable to the defendant that the scheme at issue could have resulted in some economic or pecuniary

harm to the victim. *See United States v. Vinyard,* 266 F.3d 320, 328-29 (4th Cir. 2001), *petition for cert. filed,* 70 U.S.L.W. 3535 (U.S. Jan. 8, 2002) (No. 01-1186); *United States v. Martin,* 228 F.3d 1, 17 (1st Cir. 2000); *United States v. deVegter,* 198 F.3d 1324, 1329-30 (11th Cir. 1999); *Sun-Diamond,* 138 F.3d at 973-74; *Frost,* 125 F.3d at 368.

While we see merit in each of the approaches taken by the different circuits, we believe the "reasonably foreseeable harm" standard to be superior because, in contrast to the other tests, it focuses the inquiry on whether the scheme at issue created a foreseeable risk of economic or pecuniary harm to the victim, which is consistent with traditional notions of fraud and fraudulent harm. *See McNally,* 483 U.S. at 358 (observing that "the words 'to defraud' . . . 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"). In addition, the "reasonably foreseeable harm" test has the virtue of being capable of straightforward and consistent application, while at the same time placing a reasonable boundary around what is otherwise so boundless a concept as to be a suitable candidate for a finding of unconstitutional vagueness, *see Handakas,* ___ F.3d at ___, 2002 WL 449536, at *7-*17. We hasten to add, however, that the foreseeable economic or pecuniary harm must be more than *de minimis,* in order to establish a minimum threshold that will exclude cases, such as the two hypothetical ones discussed above, that could result in some slight economic harm — such as the cost of stationery or a single phone call.

The standard we announce today clearly encompasses the economic risks that have been recognized by other circuits, such as the economic risks created by inducing an employee to disclose confidential trade secrets to a competitor, *see, e.g., Martin,* 228 F.3d at 17-18; paying an employee or agent to violate his or her duty to obtain

the most advantageous contracts or recommend the most qualified independent contractors on behalf of his or her employer or principal, *see, e.g., deVegter,* 198 F.3d at 1326, 1331; *United States v. Pennington,* 168 F.3d 1060, 1064-65 (8th Cir. 1999); and soliciting illegal or unethical conduct by an employee that endangers his employer's public reputation, *see, e.g., Sun-Diamond,* 138 F.3d at 973-74; *Frost,* 125 F.3d at 367-68.

This prudential limitation on the reach of § 1346 is consistent with our previous decisions upholding convictions under § 1346. For example, in *Sancho,* 157 F.3d at 919, we affirmed the conviction of a real estate developer who, in seeking to obtain a multi-million dollar letter of credit from a construction company to secure a construction loan, agreed to bribe the person he believed to be the company's financial consultant to induce the consultant not to disclose to the company that the letter of credit would be invested in a sham financing program. On these facts, it was reasonably foreseeable to Sancho that if his scheme were successful, it could cause economic harm to the company by putting its letter of credit at risk and by exposing it to potential liability for the construction loan. Similarly, in *Middlemiss,* 217 F.3d at 120, in which a New York Port Authority employee used his position to obtain a cafeteria lease for a company in which he had an undisclosed financial interest, it was reasonably foreseeable that the Port Authority could suffer economic harm as a result of being deprived of the opportunity to obtain a more favorable lease or to grant the lease to a superior food service company.

Accordingly, we hold that the elements necessary to establish the offense of honest services fraud pursuant to 18 U.S.C. § 1346 are: (1) a scheme or artifice to defraud; (2) for the purpose of depriving another of the intangible right of honest services; (3) where it is reasonably

foreseeable that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimis;* and (4) use of the mails or wires in furtherance of the scheme.

Applying this standard to the case at hand, we find it to have been fully satisfied in light of the evidence presented at trial and the instructions given to the jury. We will affirm a jury verdict if any rational jury "could have found the essential elements of the crime beyond a reasonable doubt." *See Walker,* 191 F.3d at 333 (internal quotation marks omitted).

The district court properly instructed the jury that in order to convict the appellants, they had to find that it was "reasonably foreseeable [to the appellants] that the companies in question might suffer economic harm as a result of the breach of the employee's duty."

Based on the evidence presented at trial, the jury could have reasonably concluded that appellants, in offering a percentage of the settlement as a kickback to the insurance company adjusters, intended to obtain favorable treatment from the adjusters at the expense of the insurance companies' intangible right to the adjusters' undivided loyalty and honest services. In addition, the jury could have found that it was reasonably foreseeable to the appellants that the effect of the payments made to the adjusters would have been to provide an incentive to the adjusters to not seek the lowest settlement amount or to not delay the settlement, thereby depriving the insurance companies of the difference between the most favorable settlement the adjusters could have otherwise obtained and the settlement actually agreed upon or the time value of money lost by expediting the settlement and disrupting the normal patterns of case disposition.

We reject appellants' efforts to define the deception at hand as a failure by the adjusters to report gratuities to their employers and to argue that this deception was immaterial to the settlement of the personal injury suits.

We are also unpersuaded by appellants' uncontested assertions that the insurance claims were settled within a reasonable range and that they intended no economic harm. First of all, even if these assertions are true, appellants' argument conflates the concepts of actual and intended harm with reasonably foreseeable harm. *See, e.g., Vinyard,* 266 F.3d at 329-30 (rejecting similar argument on ground that "[t]he reasonably foreseeable harm test [requires] neither . . . an actual economic loss nor an intent to economically harm the employer," thus regardless of whether transaction was "objectively fair," employer was deprived of opportunity to search for best price). Moreover, the jury could reasonably have inferred that the PI Plaintiffs would have been willing to accept a settlement that did not include the cost of the payments to the adjusters and, therefore, that each of the settlements was necessarily inflated by the amount of the payment. From this, it is no great leap to conclude that the payments made to the adjusters came out of their employers' respective pockets. We note that this was the same conclusion reached in the insightful and thorough opinion by the state trial court that tried and convicted other defendants who were involved in the same scheme. *See New York v. Reynolds,* 667 N.Y.S.2d 591, 595-96 (N.Y. Sup. Ct. 1997) (Fried, J.) (finding that kickback constituted economic harm to the employers, who were deprived of the opportunity of possibly settling for less). In light of the foregoing evidence and the instructions to the jury, we conclude that appellants' convictions were supported by sufficient evidence.

To recap, we hold that to convict a defendant of mail or wire fraud where the purpose of the scheme is to deprive another of the intangible right of honest services, as defined by 18 U.S.C. § 1346, the government does not have to prove actual or intended economic or pecuniary harm, but it does have to prove that it was reasonably foreseeable that the fraudulent scheme could result in some economic consequence that was more than *de minimis*. Because this requirement was satisfied in the instant case, we affirm the judgments of the district court convicting appellants of mail and wire fraud, and conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 371, 1341, and 1343.

CONCLUSION

The judgments of conviction are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of April, two thousand and two.

Present:

Hon. John M. Walker, Jr.,
Chief Judge,

Hon. José A. Cabranes,
Hon. Chester J. Straub,
Circuit Judges.

UNITED STATES COURT
OF APPEALS
FILED
APR 22 2002
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

– v.–

THOMAS RYBICKI, FREDRIC GRAE, and GRAE, RYBICKI & PARTNERS, P.C.,

Defendants-Appellants-Cross-Appellees.

No. 00-1043(L), 00-1044(CON), 00-1052(XAP), 00-1055(CON)

APPEARING FOR RYBICKI: BARRY E. SCHULMAN, ESQ., Law Office of Barry E. Schulman, Esq. (Deborah A. Santelmo, Esq., on the brief), Brooklyn, NY,

APPEARING FOR GRAE: EPHRAIM SAVITT, ESQ., New York, NY

APPEARING FOR GRAE, RYBICKI & PARTNERS, P.C.: HERALD PRICE FAHRINGER, ESQ., Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP (Erica T. Dubno, Esq., on the brief), New York, NY

APPEARING FOR APPELLEE: DANIEL R. ALONSO and KAREN R. SAGE, Assistant United States Attorneys (Loretta E. Lynch, United States Attorney for the Eastern District of New York, Peter A. Norling and David C. James, Assistant United States Attorneys, on the brief), Brooklyn, NY

Appeal from the United States District Court for the Eastern District of New York (Amon, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of said district court be and they hereby are **AFFIRMED**.

Defendants-appellants Thomas Rybicki, Fredric Grae, and the law firm of Grae, Rybicki & Partners, P.C. appeal from the January 27, 2000 judgments of the district court, following a jury trial, convicting them of mail and wire fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 371 based on their practice of making payments through middlemen or expediters to insurance company adjusters in order to settle personal injury lawsuits. To obtain more favorable settlement results, either as to timing or amount, appellants would pay a percentage of the settlement to the middlemen to split with the insurance companies' adjusters, notwithstanding that each of the insurance companies prohibited the

acceptance of any gifts or fees by adjusters and required adjusters to report the offer of any gifts or fees. Appellants Grae and Rybicki were each sentenced to terms of imprisonment of one year and one day, three years of supervised release, a $20,000 fine, and a $1,150 special assessment. The appellants' surrender date was stayed pending this appeal. Appellant Grae, Rybicki & Partners, P.C. was sentenced to three years' probation, an $80,000 fine, and a $4,600 special assessment.

On appeal, appellants raise a host of legal and factual challenges to their convictions, which, briefly summarized, are that (1) appellants' practice of settling personal injury claims through an intermediary who shared his fee with the insurance company adjuster did not constitute a "scheme or artifice to defraud" in violation of 18 U.S.C. § 1341 because the government failed to prove actual or intended economic or pecuniary harm and because any breach of duty by the adjuster was not material; (2) the government failed to prove use of the mails sufficient to bring appellants' conduct within the mail fraud statute; (3) the prosecution exceeded the jurisdictional scope of the mail and wire fraud statutes; (4) the "honest services" fraud provision, 18 U.S.C. § 1346, is void for vagueness; (5) several of the district court's jury instructions were erroneous; (6) appellants' federal prosecution constituted a vindictive prosecution in light of the dismissal of a similar state case against appellants brought by the same prosecutor; (7) prosecutorial misconduct deprived appellants of a fair trial; (8) several evidentiary rulings by the district court were erroneous; and (9) the district court erred in enhancing appellants' sentences for the "use of a special skill."

The government has filed a cross-appeal arguing that the district court erred in failing to consider the middlemen's share of the payments made by appellants in calculating the value of the bribe to determine appellants' offense

level under § 2B4.1 ("Commercial Bribery and Kickbacks") of the United States Sentencing Guidelines ("U.S.S.G." or "the guidelines").

By an opinion issued today in this case, we have addressed two of appellants' arguments: that the conduct they engaged in did not constitute a "scheme or artifice to defraud" as defined by 18 U.S.C. §§ 1341 and 1346 because there was no evidence of actual or intended economic or pecuniary harm and that § 1346 is void for vagueness. For the reasons discussed below, we find appellants' remaining challenges to lack merit. We also reject the government's claim raised in its cross-appeal.

Appellants argue that an adjuster's breach of a company's internal code of conduct cannot constitute mail fraud, and even if it could, then only if the breach is material to the transaction, which, they argue, was not the case here. We reject this argument. First of all, our cases have made clear that the breach of an internal code of conduct is sufficient to prove deprivation of honest services under § 1346 because the code of conduct constitutes proof of the duty owed by the employee to the employer. As we held in *United States v. Middlemiss*, 217 F.3d 112, 120 (2d Cir. 2000), by "violat[ing] his employer's rules regarding conflicts of interest and financial disclosures [, defendant] . . . did not render all the services that a totally faithful employee would have provided [his employer], and his actions were not in the best interests of his employer." Contrary to appellants' assertion, an employee need not owe a fiduciary duty to his employer for purposes of § 1346. *See United States v. Sancho*, 157 F.3d 918, 921 (2d Cir. 1998) (*per curiam*) ("Section 1346 does not require the existence of a fiduciary relationship."). As for whether the breach must be material to the transaction, we need not address this argument because the case at hand satisfied any such requirement. The very reason

bribes were paid to the adjusters was to obtain favorable results in settlements. The insurance companies, acting as reasonable entities, were bound to have considered the fact that their employees had a financial interest in settling cases to be important information with respect to those settlements. *See United States v. DiNome,* 86 F.3d 277, 280 (2d Cir. 1996) (affirming jury instruction charging that a representation was material if "a reasonable person might have considered [it] important in making a decision"); *see also United States v. Rodolitz,* 786 F.2d 77, 80-81 (2d Cir. 1986) (holding, in a case involving falsified insurance claims, that "the government needed to prove only that [defendant] employed a deceptive scheme intending to prevent the insurer from determining for itself a fair value of recovery").

Appellants next contend that the government failed to establish use of the mails sufficient to bring their conduct within the jurisdictional scope of the mail fraud statute. The mail fraud statute does not require that "[t]he scheme to defraud . . . contemplate the use of the mails as an essential part of the scheme." *United States v. Altman,* 48 F.3d 96, 102 (2d Cir. 1995). It is sufficient if the defendant's use of the mails is "at least incident to an essential part of the scheme." *Middlemiss,* 217 F.3d at 120. Thus, a conviction will stand if the government establishes that the defendant "'act[ed] with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.'" *Altman,* 48 F.3d at 102-03 (quoting *Pereira v. United States,* 347 U.S. 1, 8-9 (1954)) (alteration in original). We hold that this requirement was easily satisfied here given that the settlement checks issued by the insurance companies (*i.e.*, the fruition of the scheme) were sent by mail. In addition, several of the bribes were invoiced and paid by mail. Finally, the appellants' mandatory filings with the New York State Office of Court Administration,

which were adulterated to help conceal the fraud, were sent by mail. *See Schmuck v. United States,* 489 U.S. 705, 712 (1989) (holding that mailing of title-registration forms satisfied mailing requirement because they contributed to success of the scheme).

Appellants argue that their prosecution under the mail-and wire-fraud statutes violated principles of federalism and the Tenth Amendment. These claims are frivolous. Having proved the elements of mail and wire fraud, this case rests squarely within the group of cases that have prosecuted similar private sector frauds under federal law, and appellants' conduct is precisely the type of misuse of the mails and wires the statutes were meant to address. *See, e.g., United States v. Von Barta,* 635 F.2d 999, 1005 (2d Cir. 1980). In a similar vein, appellants argue that the conduct at issue here was not illegal under New York state law and, therefore, could not form the basis of federal charges. We note that both the trial and appellate courts that were involved in the state court proceedings initially brought against the appellants and others based on the same scheme found that the type of conduct at issue here did violate state law. *See New York v. Wolf,* 726 N.Y.S.2d 83, 84 (N.Y. App. Div. 2001) (holding that similar conduct by co-defendant of Grae and Rybicki "satisfie[d] the elements of commercial bribery . . . and scheme to defraud"), *leave to appeal granted,* 96 N.Y.2d 926 (2001); *People v. Reynolds,* 667 N.Y.S.2d 591 (N.Y. Sup. Ct. 1997) (denying motions to dismiss indictment charging multiple defendants — including Grae and Rybicki — with commercial bribery and scheme to defraud on grounds that scheme, if proven, would satisfy all required elements of both statutes). In any event, it is well settled that a fraudulent scheme need not violate state law in order to support a federal mail or wire fraud conviction. *See United States v. Sawyer,* 85 F.3d 713, 726 (1st Cir. 1996); *see also McNally v. United States,* 483 U.S. 350, 377 n.10 (1987) (Stevens, *J.*, dissenting).

Appellants next challenge several of the district court's jury instructions, specifically, the instructions given on the issues of "reasonably foreseeable" harm, "constructive trust," "breach of fiduciary duty," and "honest belief." The parties dispute whether appellants preserved their objections for appeal. We need not resolve this dispute because we find that appellants' claims lack merit even under the less-stringent standard we apply to preserved objections. Under this standard, we review claims of error in jury instructions *de novo* and will grant a new trial only where the jury has been misled as to the correct legal standard or inadequately informed of the law and where the error is not harmless. *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 115-16 (2d Cir. 2000). An error is harmless "if the court is convinced that the error did not influence the jury's verdict." *Id.* at 116.

The district court instructed the jury that in order to convict the appellants, they had to find that it was "reasonably foreseeable [to the appellants] that the companies in question might suffer economic harm as a result of the breach of the employee's duty." As discussed more fully in the opinion we issue today in this case, this instruction accurately reflected the law and, therefore, was not erroneous.

The district court also charged the jury that among an employee's duties to its employer is an obligation to account for secret profits. Appellants argue that this was error, relying on *United States v. Miller*, 997 F.2d 1010 (2d Cir. 1993). *Miller*, however, was not an honest services case, but an ordinary property fraud. We held that the government had failed to establish the deprivation of a property interest because a constructive trust was not a property interest. *Id.* at 1019. Thus *Miller* is inapposite because the issue here was whether the employer was deprived of its right to honest services. Indeed, the *Miller* court stated that "[i]t is

settled law that an agent owes his principal a duty of loyalty, and must account for any profits realized in connection with his representation of the principal." *Id.* at 1018. There was no error in the district court's charge.

Appellants also challenge the district judge's instructions concerning the claims adjusters' duty of loyalty to their employers, specifically her instruction that the jury need not find that a fiduciary relationship existed and also that each of the insurance companies "had a strict prohibition against claims adjusters [deriving] any personal gain from settlements." These claims lack merit. As discussed above, § 1346 does not require proof of a fiduciary duty. *See Sancho,* 157 F.3d at 920-21. In addition, the company codes of conduct did strictly prohibit employees from deriving personal gain from the settlements. Again, we find no error in this instruction.

Finally, appellants rely on *United States v. Rossomando,* 144 F.3d 197 (2d Cir. 1998), to argue that the district court's instruction on good faith warrants reversal. The district court, after instructing the jury about the specific intent the government was required to prove and that good faith is a defense, continued:

> No amount of honest belief on the part of the defendant, if such a belief existed, that the venture would ultimately succeed in such a way that no one would, in the end, suffer any loss or be deprived of the intangible right of honest services will excuse fraudulent conduct by the defendant if you conclude that such omissions were made with the specific intent to deprive another of the intangible right of honest services, even in the short term.

In *Rossomando,* this court reversed a similar charge under a plain error standard on the ground that it might be prejudicially confusing because it might mislead the

jury into convicting even if they found that the defendant did not intend to harm the victim. *Rossomando,* 144 F.3d at 199-201. The charge here is distinguishable from that given in *Rossomando* because appellants' assertion that they never intended any financial loss to the insurance companies created a factual predicate for the instruction and because the instruction here was modified to clarify that the jury had to find that the appellants intended to deprive the insurance companies of honest services. *See United States v. Koh,* 199 F.3d 632, 641 (2d Cir. 1999) (upholding similar instruction on grounds that there was a factual predicate for it and the language had been modified so that it "clearly informed the jury that they could not convict [the defendant] unless he intended to cause loss to someone") (internal quotation marks omitted) (alteration in original). Accordingly, we find that there was no error.

Among several challenges to the district court's evidentiary rulings, appellants contend that the district court erred in admitting the "McGrath Cards" against defendant Grae under the business records exception and Quigley's testimony under Fed.R.Evid. 404(b), and, further, that this evidence was unduly prejudicial to co-defendant Rybicki. "[W]e review evidentiary rulings for abuse of discretion," *United States v. Sewell,* 252 F.3d 647, 650 (2d Cir.), *cert. denied,* 122 S.Ct. 382 (2001), and find no such abuse here. The district court's decision to admit the McGrath Cards was properly based on its findings that they were created by McGrath, a person with knowledge, in the regular course of business; they were authenticated by Quigley, who was familiar with McGrath's system and had frequently relied on the cards themselves; and they constituted records whose accuracy was essential to the success of the criminal venture, thus providing adequate indicia of trustworthiness and reliability to warrant their admission.

Equally without merit is appellants' argument that Quigley's testimony concerning the five to ten transactions he conducted with Grae in the early 1980's when he was an insurance adjuster was improperly admitted under Fed.R.Evid. 404(b), and that even if properly admissible under 404(b), should have been excluded under Rule 403 because its probative value was outweighed by the prejudice it caused to Grae and Rybicki. We agree with the district court's assessment that Quigley's testimony about the earlier transactions was relevant to the issue of Grae's knowledge and intent with respect to payments to adjusters, as well as to Grae's later relationship with Quigley as a middleman. Thus, the testimony was properly admitted given appellants' refusal to stipulate to the issues of knowledge and intent.

As for spillover prejudice to Rybicki, the district court specifically instructed the jury that they could consider the McGrath Cards and Quigley's testimony only as evidence of Grae's relationships with McGrath and Quigley and that the jurors could not consider this evidence against either Rybicki or the firm. This limiting instruction was sufficient to prevent any prejudicial spillover.

The last two issues we address concern the sentences imposed upon appellants by the district court. Appellants object to the district court's imposition of a two-level enhancement in their sentences for their use of a "special skill" in the commission of the crime pursuant to U.S.S.G. § 3B1.3. We must "give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). Here, the district court agreed with the government that the appellants' skills as attorneys were integral to the fraud scheme. The district court was particularly persuaded by this court's decision in *United States v. Fritzson,* 979 F.2d 21, 22 (2d Cir. 1992) (*per curiam*), where we upheld application of the enhancement for the defendant's use of accounting skills, finding that

"[t]he fact that the same offenses could have been committed by a person without the defendant's special training is immaterial; a § 3B1.3 adjustment is proper where the defendant's special skills increase his chances of succeeding or of avoiding detection." We agree with the government that here, although the other conspirators need not have been lawyers, it was necessary to the scheme that the appellants were lawyers who represented personal injury clients. We therefore affirm the district court's enhancement.

Finally, we address the government's argument that the district judge erred in calculating the amount of the bribes for sentencing purposes under U.S.S.G. § 2B4.1 because she did not include the amount of money paid to the middlemen, but only included the amount paid by the middlemen to the adjusters. We are not persuaded by the government's argument, which is not supported by the primary case upon which it relies. In *United States v. Sutton,* 13 F.3d 595, 597 (2d Cir. 1994) (*per curiam*), while the court did state that "the bribes . . . paid to Sutton usually ranged from $750 to $1200, including the premiums paid to the middlemen," this fact had little bearing on the holding affirming the district court's calculation. In fact, the district court ultimately applied a much lower amount of $250 per bribe. *Id.* In affirming the district court's calculation, we observed that "[t]he commentary to § 2F1.1 specifies that loss 'need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information.'" *Id.* at 599 (quoting U.S.S.G. § 2F1.1, cmt. n.8 (1993)). We concluded that "the district court's findings will not be disturbed unless clearly erroneous." *Id.* (internal quotation marks omitted). Here, the district court rejected the government's calculation method, determining that "it is appropriate in light of all the factors to strictly construe this term bribe and to give the defendants the

benefit of that interpretation." We fail to see how the district court's calculation was either unreasonable or clearly erroneous.

We have carefully considered all of appellants' remaining arguments and find them to lack merit. Accordingly, for the reasons set forth above, the judgments of the district court are hereby **AFFIRMED.**

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Chandella Armstrong
Chandella Armstrong, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

– v.–

THOMAS RYBICKI, FREDRIC GRAE, GRAE, RYBICKI & PARTNERS, P.C.,

Defendants-Appellants-Cross-Appellees.

ORDER

00-1043(L),
00-1044(CON),
00-1052(XAP),
00-1055(CON)

UNITED STATES COURT
OF APPEALS
FILED
JUL 3 2002
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion for rehearing en banc having been filed by appellants, and

A poll of the judges in regular active service having been requested and taken, and a majority of the active judges of the court having voted to rehear the appeal en banc,

IT IS HEREBY ORDERED that the appeal will be reheard en banc. The en banc will consist of the active judges of the court. *See* 28 U.S.C. §46(c). The appellants' briefs, which are not to exceed thirty pages double-spaced, shall be filed by Wednesday, August 7, 2002; the appellee's brief, which is not to exceed thirty pages double-spaced, shall be filed by Friday, September 6, 2002; and the appellants' reply briefs, which are not to exceed twelve pages double-spaced,

shall be filed by Friday, September 20, 2002. Oral argument will be held on Wednesday, October 16, 2002 at 1:30 pm in the 17th Floor Courtroom at the U.S. Courthouse, 40 Foley Square, New York, NY.

Appellants, two Staten Island personal injury attorneys and their law firm, appealed their convictions for mail and wire fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 1341, 1343 and 371, based on their practice of making payments through middlemen or expediters to insurance company adjusters in return for more favorable settlements in personal injury lawsuits. The government's theory of the case was that the payments to the insurance company adjusters constituted a scheme or artifice to defraud as defined by 18 U.S.C. § 1346, which provides:

Definition of "scheme or artifice to defraud"

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

The en banc court is being convened to consider the question of whether 18 U.S.C. § 1346 is unconstitutionally vague on its face. *See United States v. Rybicki*, 287 F.3d 257, 263-65 (2d Cir. 2002); *United States v. Handakas*, 286 F.3d 92, 101-13 (2d Cir. 2002). Counsel for all parties are directed to address this issue in their briefs.

FOR THE COURT,
ROSEANN B. MacKECHNIE, CLERK

By: /s/ Lucille Carr

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos.
00-1043,
00-1044,
00-1052,
00-1055

UNITED STATES OF AMERICA,

v.

THOMAS RYBICKI, *ET AL.*

ORIGINAL

UNITED STATES COURT
OF APPEALS
FILED
JAN 5 – 2004
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

MOTION for:
STAY OF MANDATES PENDING
PETITION FOR CERTIORARI

MOVING PARTY: Defendants-Appellants
MOVING ATTORNEY:
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OPPOSING ATTORNEY:
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Court-Judge/Agency appealed from: The Honorable Carol B. Amon, United States District Judge, Eastern District of New York.

Has **consent** of opposing counsel:
A. been sought? __ Yes X No
B. been obtained? __ Yes X No

Is **oral argument** requested?
X Yes __ No

Has **argument** date of appeal been set: X Yes __ No
If yes, enter date: 10/16/02

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below?
__ Yes X No

Has this relief been previously sought in this Court?
__ Yes X No

Requested return date and explanation of emergency: _____
_____
_____

UNITED STATES COURT
OF APPEALS
FILED
JAN 15 2004
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Signature of Moving Attorney:

/s/ Herald Price Fahringer

Date: Jan. 5, 2004 Has service been effected?

ORDER

Before: Hon. John M. Walker, Jr., *Chief Judge*, Hon. Dennis Jacobs, Hon. Guido Calabresi, Hon. José A. Cabranes, Hon. Chester J. Straub, Hon. Rosemary S. Pooler, Hon. Robert D. Sack, Hon. Sonia Sotomayor, Hon. Robert A. Katzmann, Hon. B.D. Parker, Jr., Hon. Reena Raggi, *Circuit Judges.*

IT IS HEREBY ORDERED that the motion to stay issuance of the mandates pending a petition for a writ of certiorari be and it hereby is GRANTED.

1/15/04
Date

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

by /s/ Laura Bass Penn
Laura Bass Penn, Motions Staff Attorney

(3)

Supreme Court, U.S.
FILED
MAY 28 2004
OFFICE OF THE CLERK

No. 03-1375

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
JUN 2 - 2004
OFFICE OF THE CLERK

THOMAS RYBICKI, FREDERIC GRAE, AND GRAE, RYBICKI & PARTNERS, P.C., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether 18 U.S.C. 1346 violates principles of federalism.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Badders v. *United States*, 240 U.S. 391 (1916)	14-15
Carpenter v. *United States*, 484 U.S. 19 (1987)	8
Chapman v. *United States*, 500 U.S. 453 (1991)	7
City of Chicago v. *Morales*, 527 U.S. 41 (1999)	6, 13
Cleveland v. *United States*, 531 U.S. 12 (2000)	9, 15
McNally v. *United States*, 483 U.S. 350 (1987)	5, 8, 9
Parker v. *Levy*, 417 U.S. 735 (1974)	8
People v. *Wolf*, 98 N.Y.2d 105 (2002)	13
Screws v. *United States*, 325 U.S. 91 (1945)	10
United States v. *Antico*, 275 F.3d 245 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002)	14
United States v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 522 U.S. 1028 (1997)	7, 14, 15
United States v. *Castro*, 89 F.3d 1443 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997)	10, 14
United States v. *Frega*, 179 F.3d 793 (9th Cir. 1999), cert. denied, 528 U.S. 1191 and 529 U.S. 1029 (2000)	10
United States v. *Frost*, 125 F. 3d 346 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998)	10
United States v. *Gray*, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997)	10

Cases—Continued: Page

United States v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002) 10
United States v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997) 12
United States v. *Lanier*, 520 U.S. 259 (1997) 7
United States v. *Lanza*, 260 U.S. 377 (1922) 15
United States v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984) 8
United States v. *Mazurie*, 419 U.S. 544 (1975) 7, 14
United States v. *Olano*, 507 U.S. 725 (1993) 8
United States v. *Panarella*, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002) 15
United States v. *Paradies*, 98 F.3d 1266 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997) 9
United States v. *Salerno*, 481 U.S. 739 (1987) 6
United States v. *Sawyer*, 239 F.3d 31 (1st Cir. 2001) 14
United States v. *Szur*, 289 F.3d 200 (2d Cir. 2002) 10
United States v. *Vinyard*, 266 F.3d 320 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002) 9
United States v. *Welch*, 327 F.3d 1081 (10th Cir. 2003) 10

Statutes and rule:

18 U.S.C. 371 2
18 U.S.C. 1341 ..... 2, 3, 8, 9, 14, 15
18 U.S.C. 1343 ..... 2, 3, 8, 9, 14
18 U.S.C. 1346 ..... 3, 6, 7, 9, 10, 13, 14, 15
Fed. R. Crim. P. 52(b) 4-5, 7

In the Supreme Court of the United States

No. 03-1375

THOMAS RYBICKI, FREDERIC GRAE, AND GRAE, RYBICKI & PARTNERS, P.C., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A79) is reported at 354 F.3d 124. The opinion of the court of appeals panel (Pet. App. A81-A98) is reported at 287 F.3d 257. The summary order of the court of appeals panel (Pet. App. A99-A110) is not published in the *Federal Reporter*, but it is available at 38 Fed. Appx. 626.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 29, 2003. The petition for a writ of certiorari was filed on March 29, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on 20 counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioners Thomas Rybicki and Frederic Grae were each sentenced to a term of imprisonment of one year and one day, to be followed by three years of supervised release, and each was subjected to a fine of $20,000 and a $1150 special assessment. Petitioner Grae, Rybicki & Partners, P.C., was sentenced to three years of probation and was subjected to a fine of $80,000 and a $4600 special assessment. Pet. App. A32. A panel of the court of appeals affirmed, addressing some issues in a published opinion (*id.* at A81-A98) and others by unpublished summary order (*id.* at A99-A110). The court subsequently granted rehearing en banc and affirmed the convictions, with four judges dissenting. *Id.* at A1-A79.

1. Petitioners Rybicki and Grae are lawyers specializing in personal injury cases. Petitioner Grae, Rybicki & Partners, P.C., is the law firm at which they practice. Acting through intermediaries, petitioners arranged for payments to be made to claims adjusters employed by insurance companies that had insured against injuries sustained by petitioners' clients The payments, which typically were computed as a percentage of the total settlement amount, were intended to induce the adjusters either to settle the clients' claims more quickly or to offer larger settlement amounts. Although each of the insurance companies had a written policy prohibiting adjusters from accepting gifts or fees and requiring them to report the offer

of any such payments, the adjusters accepted the payments and did not disclose them to their employers. Between 1991 and 1994, petitioners caused payments to be made to adjusters in at least 20 cases that settled for an aggregate of $3 million. Petitioners and other participants in the scheme took considerable steps to disguise and conceal the payments. Pet. App. A4-A5, A84.

2. The indictment in this case charged petitioners with mail and wire fraud offenses and with conspiracy to commit mail fraud. See Pet. App. A5. The federal mail and wire fraud statutes prohibit the use of mail or wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. The term "scheme or artifice to defraud" is defined to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

3. A panel of the court of appeals affirmed petitioners' mail and wire fraud convictions. Pet. App. A81-A110.

a. Petitioners contended that 18 U.S.C. 1346 requires proof of actual or intended economic or pecuniary harm to the victim. The court of appeals rejected that claim, holding that such a requirement "would contravene Congress's clear intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another." Pet. App. A87.

b. Petitioners contended that Section 1346's expansion of the definition of "scheme or artifice to defraud" to include a scheme or artifice to deprive another of "the intangible right of honest services" is unconstitutionally vague. Pet. App. A89. The court of appeals found "no basis" for finding Section 1346 vague as

applied to petitioners' conduct in this case. *Id.* at A91. The court explained that petitioners must have known that their conduct was unlawful in light of their status as "sophisticated attorneys" (*id.* at A91) and the steps they took to avoid detection (*id.* at A91-A92).

c. Petitioners contended that the evidence of honest services fraud was insufficient to support their convictions. The court of appeals concluded that the jury could reasonably have found that petitioners, by their payment of bribes, intended to obtain favorable treatment from the adjusters at the expense of the insurance companies' intangible right to the adjusters' honest services. Pet. App. A96. The court also found that it was "reasonably foreseeable" to petitioners that the bribes provided the adjusters with an incentive not to seek the lowest settlement amount or not to delay settlements, "thereby depriving the insurance companies of the difference between the most favorable settlement the adjusters could have otherwise obtained and the settlement actually agreed upon or the time value of money lost by expediting the settlement and disrupting the normal patterns of case disposition." *Ibid.*

d. Petitioners contended that their prosecution violated principles of federalism. Characterizing that claim as "frivolous," the court of appeals stated that "this case rests squarely within the group of cases that have prosecuted similar private sector frauds under federal law, and [petitioners'] conduct is precisely the type of misuse of the mails and wires the statutes were meant to address." Pet. App. A104.

4. The court of appeals granted rehearing en banc, and the en banc court affirmed petitioners' convictions. Pet. App. A1-A79.

Because petitioners had not raised a facial vagueness challenge to Section 1346 at trial, the en banc court of appeals reviewed their facial vagueness claim under the plain-error standard of Federal Rule of Criminal Procedure 52(b). Pet. App. A7-A8. In addressing that challenge to Section 1346, the court framed the relevant question as "whether, even if the meaning of the statute is not plain enough on its face, there was a 'well-settled meaning' of 'scheme or artifice to deprive another of the intangible right of honest services' at the time that Congress enacted section 1346 in 1988." *Id.* at A21. To resolve that question, the court looked to the line of authority that was overruled by this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), which held that the mail and wire fraud statutes were enacted to protect property rights and did not criminalize schemes to deprive individuals or the government of intangible rights, such as the right of honest services. Pet. App. A22. The court explained that Section 1346 was intended to "'overrule' *McNally* at least in part, *i.e.*, to place within the statutory proscription certain frauds that *McNally* had held were not covered by the mail-fraud and wire-fraud statutes." *Id.* at A21.

After reviewing pertinent pre-*McNally* decisions, the en banc court of appeals concluded that, as applied to private actors, Section 1346 proscribes "a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity * * * purporting to act for and in the interests of his or her employer * * * secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer." Pet. App. A31-A32 (footnote omitted); see *id.* at A40-A41. Under that standard, the court explained, "actual or intended economic or pecuniary

harm to the victim need not be established." *Id.* at A37. Rather, for purposes of the statute, a misrepresentation or omission is "material" if it "would naturally tend to lead or is capable of leading a reasonable employer to change its conduct." *Id.* at A39.

The en banc court of appeals held that petitioners' actions "f[e]ll squarely" within the coverage of Section 1346 as so construed. Pet. App. A32-A33; see *id.* at A41. The court further concluded (*id.* at A35) that the statute's "clear prohibition" applied to a sufficiently "wide swath of behavior" as to foreclose a determination of facial invalidity under either *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (facial challenge may be sustained only if no set of circumstances exists under which the statute would be valid), or *City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (opinion of Stevens, J.) (statute may be struck down as impermissibly vague if "vagueness permeates the text" of the law). The court did not "suggest [a] preference" for either approach to facial challenges. Pet. App. A13.

Four members of the en banc court of appeals dissented. Pet. App. A61-A79; see *id.* at A59-A60 (separate dissenting opinion for two of the four judges). The dissenters acknowledged that petitioners had "likely forfeited their vagueness challenge, and that the issue is one of plain error." *Id.* at A61. Based on their analysis of the separate opinions in *Morales*, the dissenting judges would have held that a criminal statute is impermissibly vague if it "reaches a substantial amount of innocent conduct and thereby fails to establish minimal guidelines to govern law enforcement." *Id.* at A64 (brackets and internal quotation marks omitted). Those judges would have found Section 1346 to be impermissibly vague under that standard. *Id.* at A65-A79. The dissenting judges stated that "there is no

settled meaning to the phrase 'the intangible right of honest services' that is capable of providing constitutionally adequate notice" (*id.* at A69); that Section 1346 provides insufficient guidance to law enforcement officials charged with enforcing it (*id.* at A70-A73); and that there is "wide disagreement among the circuits as to the elements of the 'honest services' offense" (*id.* at A73).

ARGUMENT

1. Petitioners contend (Pet. 12-22) that 18 U.S.C. 1346 is void for vagueness. As all the members of the en banc court of appeals recognized (Pet. App. A7, A61), petitioners failed to raise that contention in the district court. Accordingly, their claim may be reviewed only for plain error. See Fed. R. Crim. P. 52(b).

The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997); see *United States* v. *Brumley*, 116 F.3d 728, 732 (5th Cir.) (en banc) ("Gauging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code."), cert. denied, 522 U.S. 1028 (1997). Under this Court's precedents, petitioners may not attack Section 1346 as unconstitutionally vague simply by showing that hypothetical situations may exist in which the statute would be ambiguous. Rather, they can prevail only by showing that the statute failed to provide clear warning that their own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is

applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 735, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Petitioners cannot show that Section 1346 was vague as applied to the conduct for which they were convicted, much less that any error in applying the statute to them was "plain" within the meaning of Rule 52(b), in the sense of "'clear' or, equivalently, 'obvious.'" *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

a. The mail fraud statute, 18 U.S.C. 1341, and the wire fraud statute, 18 U.S.C. 1343, make it unlawful to use mail or wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[1] Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the intangible rights covered by the statute included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

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[1] Because the mail and wire fraud statutes share the same operative language, the same analysis applies to both sets of offenses. See *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

In *McNally*, this Court rejected the "intangible rights" theory of mail fraud prosecution, holding that the mail fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360. Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

b. The lower federal courts "have consistently recognized" that Section 1346 extends the coverage of the mail and wire fraud statutes to certain corrupt acts, such as bribery, "perpetrated in private commercial settings," if those acts fraudulently deprive the victim of the "honest services" of a person owing him a duty of honesty or loyalty. *United States* v. *Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002). At the time of petitioners' offenses, there was consequently ample precedent indicating that the undisclosed payment of bribes to an employee in order to obtain favored treatment from his company constitutes a deprivation of "honest services" within the meaning of Section 1346. That interpretation is consistent with the understanding of honest services fraud that prevailed in the lower courts before this Court's decision in *McNally*. By requiring proof beyond a reasonable doubt of intent to defraud, see, *e.g.*, *United States* v. *Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997), Sections 1341 and

1343 ensure that defendants are not subjected to criminal liability for accidental misrepresentations or omissions. That requirement does much to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945) (opinion of Douglas, J.).

c. The courts of appeals have unanimously rejected claims that Section 1346 is void for vagueness. See, *e.g.*, *United States* v. *Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 and 529 U.S. 1029 (2000); *United States* v. *Frost*, 125 F.3d 346, 370-371 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).[2] In light of that judicial consensus, petitioners cannot plausibly claim that the court of appeals committed "clear" or "obvious" error (see p. 8, *supra*) entitling them to relief under Rule 52(b).

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[2] In *United States* v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002), the only case in which a vagueness challenge to Section 1346 has been upheld, the court concluded that the statute was impermissibly vague as applied to a bid contractor who willfully breached a contractual requirement that he pay the prevailing wage to his employees and who then misrepresented the wages on disclosure forms required to be filed under state law. *Id.* at 96-97. In the instant case, the en banc court overruled the constitutional holding in *Handakas* and concluded that the conduct at issue there was not within the scope of Section 1346. Pet. App. A36.

d. Petitioners contend (Pet. ii, 14-15) that Section 1346 is unconstitutionally vague as applied to their conduct because the insurance companies were not shown to have suffered any financial loss as a result of the fraudulent scheme. Congress's objective in enacting Section 1346, however, was to make clear that the coverage of the mail and wire fraud statutes is not limited to schemes to defraud the victim of money or property. As the court of appeals panel in this case explained, requiring proof of actual or intended financial loss would "vitiate § 1346 and would contravene Congress's clear intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another." Pet. App. A87.

In any event, petitioners' scheme created a clear *potential* for financial loss to the victimized insurance companies. As the court of appeals panel explained, "the jury could have found that it was reasonably foreseeable to [petitioners] that the effect of the payments made to the adjusters would have been to provide an incentive to the adjusters to not seek the lowest settlement amount or to not delay the settlement." Pet. App. A96. That is so notwithstanding the government's acknowledgment at trial "that it would not seek to prove that the amount of any of the settlements connected with a payment to an adjuster had been inflated above what would have been a reasonable range for that settlement." *Id.* at A5. The concept of a "reasonable range" for settlement presupposes the existence of higher and lower figures within the range. If adjusters' settlement decisions were affected in one of the ways described above, the effect would be to "depriv[e] the insurance companies of the difference between the most favorable settlement the adjusters could have other-

wise obtained and the settlement actually agreed upon or the time value of money lost by expediting the settlement and disrupting the normal patterns of case disposition." *Id.* at A96. In either event, the insurer would suffer a financial loss, notwithstanding the reasonableness of the settlement amount. See *id.* at A97.

Petitioners' reliance (Pet. 14) on *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), is misplaced. In *Jain*, the court reversed the mail fraud conviction of a psychologist who received kickbacks from a hospital for patient referrals. *Id.* at 441-442. In rejecting the contention that the defendant had defrauded his patients by failing to disclose the referral fees, the court stated that "a fiduciary's nondisclosure must be material to constitute a criminal scheme to defraud." *Id.* at 442. The court found "no evidence that any patient would have considered Dr. Jain's [referral fee] material if it did not affect the quality or cost of his services to that patient." *Ibid.* In the instant case, by contrast, the relevant insurers evidently did regard petitioners' kickbacks as objectionable, since "[e]ach of the insurance companies maintained a written policy that prohibited the adjusters from accepting any gifts or fees and required them to report the offer of any such gratuities." Pet. App. A4.

e. Petitioners assert (Pet. 14-17) that the courts of appeals are divided on certain subsidiary issues relating to the proper construction of Section 1346. Those issues include whether economic harm to the victim must be reasonably foreseeable to the defendant; whether the defendant must intend to obtain personal gain from the scheme; whether the defendant must breach a fiduciary duty; and whether the duty to provide honest services must arise from state law. As the en banc court of

appeals explained, however, "divergence in panel or circuit views of a statute, criminal or otherwise, is inherent—and common—in our multi-circuit system. Disparity does not establish vagueness." Pet. App. A33.

In any event, the circuit divisions alleged by petitioners could not have rendered Section 1346 vague as applied to the conduct that formed the basis of the instant prosecution. The court of appeals panel correctly found that the evidence satisfied any requirement of "reasonably foreseeable" economic harm to the victimized insurance companies (Pet. App. A96); petitioners intended to obtain a personal benefit from the scheme in the form of claims settlements that were more advantageous to their clients, in terms either of timing or of settlement value; and insurance adjusters have a duty under New York's commercial bribery law to refrain from the type of transactions that are at issue in this case (*i.e.*, the payment of kickbacks by attorneys in return for quicker or larger settlements for their clients), see *People* v. *Wolf*, 98 N.Y.2d 105, 109-119 (2002). Thus, any uncertainty about the precise scope of Section 1346's coverage could not have deprived petitioners of fair warning that their own conduct was prohibited by the federal mail and wire fraud statutes.

f. Petitioners argue (Pet. 19-20) that the appropriate test for reviewing their void-for-vagueness claim is not whether Section 1346 is vague as applied to their own conduct, but whether "vagueness permeates the text" of the statute. See *City of Chicago* v. *Morales*, 527 U.S. 41, 55 & n.22 (1999) (opinion of Stevens, J.). The en banc court of appeals, however, correctly held that Section 1346 would not be impermissibly vague under that standard because the statute's "clear pro-

hibition applies to a wide swath of behavior." Pet. App. A35.

In any event, the standard articulated by the *Morales* plurality does not apply in the circumstances presented here. Justice Stevens's opinion in that case explained that the challenged anti-loitering ordinance "contain[ed] no *mens rea* requirement and infringe[d] on constitutionally protected rights." *Id.* at 55 (citation omitted). The plurality then stated that, "[w]hen vagueness permeates the text of *such a law*, it is subject to facial attack." *Ibid.* (emphasis added). Unlike the ordinance at issue in *Morales*, the federal mail and wire fraud statutes contain an explicit scienter requirement (*i.e.*, that the mails or wires be used "for the purpose of executing [a] scheme or artifice [to defraud]," 18 U.S.C. 1341, 1343), and they do not infringe on constitutionally protected rights. A vagueness challenge to the application of those statutes is therefore properly reviewed "in light of the facts of the case at hand." *Mazurie*, 419 U.S. at 550.

2. Petitioners contend (Pet. 25-27) that Section 1346 violates principles of federalism. As with their vagueness challenge, petitioners failed to raise that claim in the district court, and it is therefore reviewable only for plain error.

The courts of appeals have uniformly rejected federalism challenges to 18 U.S.C. 1346. See, *e.g.*, *United States* v. *Antico*, 275 F.3d 245, 262 n.18 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002); *United States* v. *Sawyer*, 239 F.3d 31, 43 n.13 (1st Cir. 2001); *Brumley*, 116 F.3d at 735; *Castro*, 89 F.3d at 1456. Section 1346 does not establish a freestanding federal offense; it simply defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes. Those statutes in turn require proof that the defendant used

the mails (18 U.S.C. 1341) or some "wire, radio, or television communication in interstate or foreign commerce" (18 U.S.C. 1343) to execute the fraudulent scheme. Those jurisdictional nexus requirements provide a constitutionally sufficient predicate for the exercise of congressional power. See, *e.g.*, *Badders* v. *United States*, 240 U.S. 391, 393 (1916) ("Whatever the limits to [Congress's] power, it may forbid [the use of the mails] in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.").

Petitioners argue (Pet. 26) that Section 1346 violates principles of federalism as applied in this case because their conduct was sufficiently regulated by New York law. A large number of federal offenses, however, including bank robbery and narcotics trafficking—and, for that matter, fraudulent efforts to obtain money or property—can also be prosecuted under state law. This Court has made clear that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). Rather than creating a constitutional infirmity, the existence of a state law prohibition on a particular defendant's conduct reduces any potential federalism concerns that might otherwise be presented by a prosecution under 18 U.S.C. 1341 or 1343. See *United States* v. *Panarella*, 277 F.3d 678, 699 (3rd Cir.), cert. denied, 537 U.S. 819 (2002); *Brumley*, 116 F.3d at 735.

Petitioners' reliance (Pet. 25) on *Cleveland* v. *United States*, 531 U.S. 12 (2000), is also unavailing. In *Cleveland*, the Court concluded that unissued state permits or licenses do not constitute "property" within the meaning of 18 U.S.C. 1341. See 531 U.S. at 26-27.

Nothing in *Cleveland* casts doubt on the constitutionality of Section 1346. Indeed, the Court in *Cleveland* specifically noted that "[i]n this case, there is no assertion that Louisiana's video poker licensing scheme implicates the intangible right to honest services." *Id.* at 20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

THOMAS RYBICKI, FREDRIC GRAE,
GRAE, RYBICKI & PARTNERS, P.C.,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
"If Not Now, When?"	1
The Conflicts Among the Circuits Over 18 U.S.C. § 1346 Are Not "Subsidiary" and Should be Resolved	3
Section 1346 Undermines Fundamental Principles of Federalism	5
The Solicitor General's Response Lends Force to the Pressing Need for Review by this Court of the Proper Test for Void-for-Vagueness Claims	6
Conclusion	7

TABLE OF AUTHORITIES

Carlson v. Green,
446 U.S. 14 (1980) 2

City of Chicago v. Morales,
527 U.S. 41 (1999) 6, 7

Cleveland v. United States,
531 U.S. 12 (2000) 5

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 2

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 4

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997) (*en banc*),
cert. denied, 522 U.S. 1028 (1997) 3

United States v. Frost,
125 F.3d 346 (6th Cir. 1997),
cert. denied, 525 U.S. 810 (1998) 4

United States v. Jain,
93 F.3d 436 (8th Cir. 1996),
cert. denied, 520 U.S. 1273 (1997) 4

United States v. Margiotta,
811 F.2d 46 (2d Cir. 1982),
cert. denied, 461 U.S. 913 (1983) 3

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) (*en banc*) 2, 4

United States v. Salerno,
481 U.S. 739 (1987) 6

"If Not Now, When?"

Our Petition for Certiorari urged that 18 U.S.C. § 1346 is facially vague because in criminalizing, but without defining, a scheme to "deprive another of the intangible right of honest services," it fails to provide adequate notice to the public of what conduct is to be avoided. In addition, its lack of any standards of enforcement fails to channel the discretion of prosecutors and, instead, authorizes prosecutions that extend well outside the realm of federal concern.

Despite the recurring nature of this urgent constitutional issue, and the other serious questions that attach to § 1346, the government resists review based upon a claim that the vagueness challenge was not properly preserved. Additionally, although the government does *not* deny the division among the circuits, it urges, instead, that the split need not be addressed because it is on subsidiary issues. They are wrong on both counts.

Recognizing the substantiality of the issues implicated by § 1346, the Second Circuit invoked the rarely utilized *en banc* review to consider the Petitioners' vagueness challenge. As a consequence, the Second Circuit, in no less than *five opinions*, discussed fully every aspect of these issues on the merits. Although a narrow majority exonerated § 1346 on charges of vagueness, a significant membership of the court dissented and firmly asserted that the statute is fatally vague on its face. Thus, as indicated in our initial petition, this case presents *the* ideal platform for a definitive resolution of the perennial questions that continue to threaten the validity of § 1346.

In fact, the logical strength of the dissents, combined with the painstaking analysis of the majority, effectively frame the issues for this Court to decide.[1]

Furthermore, citing to decisions from six circuits,[2] the government states that the courts of appeals have *unanimously* rejected claims that § 1346 is void for vagueness (Br. for Solicitor General at 10). However, the rejections themselves were hardly unanimous where *en banc* proceedings from the Second and Fifth Circuits produced strenuous dissents. In fact, the roll of circuit court judges who have concluded that § 1346 is fatally vague — or expressed grave misgivings over the honest services doctrine — is astounding. For example, from the Second Circuit, the list includes Chief Judge John M. Walker Jr., Circuit Judges Dennis Jacobs, José A. Cabranes, Barrington D. Parker Jr.,[3] James L. Oakes, Thomas J. Meskill, Jon O.

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[1] Even if the issue was not properly preserved, this Court is fully authorized to review a question of such constitutional magnitude. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (Court exercised its discretion to consider important question advanced in Petition for Certiorari and fully briefed by both sides); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (interests of judicial administration served by addressing the merits of a recurring issue which was not presented in the district court or the court of appeals).

[2] The Second, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits.

[3] *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*).

Newman and Ralph K. Winter.[4] Circuit Judges E. Grady Jolly, Harold R. DeMoss Jr. and Jerry E. Smith of the Fifth Circuit have also voiced serious concerns regarding § 1346.[5]

This impressive core of jurists, who have denounced or questioned the honest services doctrine, lends significant force to our complaints and the urgent need for resolution by this Court. And, in light of the fact that these issues will persist through a continuing stream of petitions to this Court, and considering that divisions among the circuits will likely deepen, the time to address these questions is now.

The Conflicts Among the Circuits Over 18 U.S.C. § 1346 Are Not "Subsidiary" and Should be Resolved

Our Petition also established that Certiorari is warranted in this case because, as recognized by the dissenters from the Second Circuit, the "circuits are fractured" on at least *five* basic issues regarding § 1346 (App. 76):

1. The requisite *mens rea* to commit the crime;
2. whether the defendant must cause actual tangible harm;
3. the duty that must be breached;

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[4] *United States v. Margiotta*, 811 F.2d 46 (2d Cir. 1982) (dissenting from denial of rehearing *en banc* and believing that the extension of the mail fraud statute warrants consideration of the "fundamental and recurring issue of whether the statute applies to schemes to defraud members of the public of intangible rights"), *cert. denied*, 461 U.S. 913 (1983).

[5] *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997).

4. the source of that duty; and

5. which body of law informs us of the statute's meaning (App. 76).[6]

Rather than dispute the existence of these conflicts, the government tries to minimize the differences over questions concerning the construction of § 1346 by labeling them "subsidiary" (Br. for Solicitor General at 12). However, the *mens rea* of a criminal statute is hardly "subsidiary." Thus, contrary to the contentions of the government, there *is* an urgent need to resolve the significant conflicts that stem from the high quotient of ambiguity that afflicts § 1346 — and, which has so disrupted the uniform administration of this crucial arm of mail fraud prosecutions.

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[6] For example, the Second and Eighth Circuits are split on whether a specific intent to cause actual harm is required. *Compare United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (App. 76), with *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997). Similarly, the Second Circuit holds that any misrepresentation must be "material" whereas the Sixth Circuit requires only that it is "reasonably foreseeable" that the victim would suffer economic harm. *Compare Rybicki*, (App. 74), with *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998). There is a further division among the circuits as to what *mens rea* must be proved by the government. The Second Circuit requires only an intent to deprive another of the intangible right of honest services. *Rybicki*, (App. 37-38). However, the Seventh Circuit demands an intent to achieve personal gain. *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998). This inventory of the festering conflicts is illustrative only, and by no means complete. A more comprehensive analysis is contained in Judge Jacobs' dissent (App. 73-74).

There is a need for uniformity in each of these areas of conflict to satisfy the constitutional necessities of the Equal Protection Clause.[7] The resolution and settling of these types of conflicts is precisely the primary office that this Court fulfills. Therefore, the split in the circuits over several critical issues tied directly to the construction of § 1346 is extremely important and should be considered by this Court.

Section 1346 Undermines Fundamental Principles of Federalism

The government suggests that this case does not implicate notions of federalism because § 1346 "does not establish a freestanding federal offense" (Br. for Solicitor General at 14). However, the elusive language of § 1346 enables federal prosecutors to significantly broaden the scope of *all* federal fraud statutes to "place under federal superintendence a vast array of conduct traditionally policed by the States." *See Cleveland v. United States*, 531 U.S. 12, 27 (2000). In view of the Court's concerns in recent cases such as *Cleveland*, review is certainly warranted in this case where the ambiguities of § 1346 actually encourage federal prosecutors to encroach in areas historically reserved to the States.

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[7] For example, as § 1346 stands today, a person could be convicted and sentenced to 20 years in prison in one circuit without ever having intended to harm the victim, whereas in another circuit, that same person would be set free if the government failed to prove the obligatory *mens rea* requiring a specific intent to cause the victim pecuniary harm. This striking differential in consequences is constitutionally intolerable under any concept of equal protection of the law.

The Solicitor General's Response Lends Force to the Pressing Need for Review by this Court of the Proper Test for Void-for-Vagueness Claims

Our Petition for Certiorari emphasized the lack of consensus in this Court, and throughout the country, on the proper standard to be applied when the constitutionality of a federal criminal statute is challenged on its face. As a consequence, there is turmoil in our courts over what standard should be used to gauge a facial challenge, *i.e.*, whether "vagueness permeates the text" of the statute (*City of Chicago v. Morales*, 527 U.S. 41, 55 [1999]), or whether "no set of circumstances exists under which the Act would be valid" (*United States v. Salerno*, 481 U.S. 739, 745 [1987]). That division is particularly evident in this case, where the majority and dissenters in the *en banc* proceeding could not agree on what standard governs.

The government attempts to limit *Morales* to circumstances where an ordinance contains no *mens rea* requirement and infringes on constitutionally protected rights (Br. for Solicitor General at 14). Thus, the need to resolve the question of whether the *Morales* test should be limited to certain types of federal statutes is acute. Furthermore, the Solicitor General's stance on this issue amplifies the conflict instigated by *Morales*, which has *not* been limited by other courts to constitutionally protected liberty rights. And, review is particularly apt

here, where the *mens rea* required under the "honest services" doctrine is so unclear as to render it practically non-existent.[8]

In sum, rather than defeat certiorari in this case, the Solicitor General's response actually lends great force to the need for review by this Court.[9]

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[8] In our case, the dissent recognized that § 1346 "flunks the test for facial vagueness set forth by the Supreme Court" in *Morales* (App. 61).

[9] It is disappointing that the Solicitor General would suggest that the gratuities received by employees of the insurance companies might have affected the settlements in some way. That is unsupported by the record and is inconsistent with the government's *concessions* that "inflation of the claims is not alleged" and there is no contention that the settlements were "inflated." Second Circuit Appendix at 356-57. Moreover, the majority *and* dissenting judges, in the *en banc* proceeding, referred to these payments as "gratuities" (App. 3, 73). The dissent even stressed that there was "certainly no reason for these defendants to believe that the gratuities at issue — which the government never contended caused a loss — amounted to a federal mail or wire fraud violation" (App. 73 n.1).

Conclusion

For all the foregoing reasons, as well as those raised in the original petition, the Petitioners pray that a Writ of Certiorari issue to review the Second Circuit's opinion in this case.

Dated: New York, New York
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IN THE

Supreme Court of the United States

THOMAS RYBICKI, FREDRIC GRAE and
GRAE, RYBICKI & PARTNERS, P.C.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS, JOINED BY THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. 5

II. 8

CONCLUSION 14

TABLE OF AUTHORITIES

AMFAC Resorts, L.L.C. v. United States Department of the Interior, 282 F.3d 818 (D.C. Cir. 2002) .. 12

Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002) 12

City of Chicago v. Morales, 527 U.S. 41 (1999) 4, 8, 10-12

Colautti v. Franklin, 439 U.S. 379 (1979) 11

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 11

Horton v. City of St. Augustine, 272 F.3d 1318 (11th Cir. 2001) 12

Kolender v. Lawson, 461 U.S. 352 (1983) 9

Lerman v. Board of Elections, 232 F.3d 135 (2d Cir. 2000) 9, 12

McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875 (1987) 2, 6, 7

Neder v. United States, 527 U.S. 1 (1999) 8

Rogers v. Tennessee, 532 U.S. 451 (2001) 7

S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461 (9th Cir. 2001) 12

Smith v. Goguen, 415 U.S. 566 (1974) 12

Staley v. Jones, 239 F.3d 769 (6th Cir. 2001) 12

United States v. Frandsen, 212 F.3d 1231 (11th Cir. 2000) 12

United States v. Handakas, 286 F.3d 92 (2d Cir. 2002) 5, 12

United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) 7

United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) 4-8

United States v. Salerno, 481 U.S. 739 (1987) 4, 8,10

STATUTES, RULES AND REGULATIONS

18 U.S.C. §1346 ..... 4, 5

Rules of the Supreme Court, Rule 10 7

Rules of the Supreme Court, Rule 37 1

OTHER AUTHORITIES

Dorf, "Facial Challenges to State and Federal Statutes," 46 Stan. L. Rev. 235 (Jan. 1994) 13

INTERESTS OF *AMICI CURIAE* [1]

The New York Council of Defense Lawyers ("NYCDL"), established in 1986, is a not-for-profit professional association whose elected membership consists of approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. The NYCDL's principal mission is to engage the Bench and Bar, including government attorneys, in a continuing collegial dialogue — through symposia, retreats, lectures, testimony, *amicus* briefs, and special events — concerning the legal, ethical and practical issues confronting attorneys and judges in the criminal justice system, particularly in the federal courts of New York. Because of the wide experience and expertise of its members, the NYCDL has been invited to appear as *amicus curiae* in federal and state appellate courts. Representatives of the NYCDL have testified before Congress and the United States Sentencing Commission.

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1. Pursuant to Rule 37(2)(a) and (6) of the Rules of the Court, the consent of the parties to submission of this *amicus* brief has been obtained and filed with the Clerk of the Court. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than the organizations named in the Statement of Interest, has made a monetary contribution to the preparation or submission of this brief.

Many of the NYCDL's members have, as federal prosecutors, investigated or prosecuted "white-collar" crime and official corruption, including mail and wire fraud, and many of its members have defended clients in such investigations or prosecutions. As a result, the NYCDL has vast experience with and a deep professional interest in the meaning and application of 18 U.S.C. §1346, Congress's attempt to restore the government's ability to prosecute deprivations of "the intangible right of honest services" through the federal fraud statutes following the Supreme Court's rejection of the "honest services" theory in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987). The NYCDL is therefore uniquely qualified to comment on, and to assist this Court in deciding, the important constitutional issue whether §1346 is unconstitutionally vague on its face.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its

particular concerns is ensuring that all individuals, including the criminally accused and suspected, not be subjected to prosecutorial overreaching.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of approximately 800 attorneys, including private practitioners, public defenders and law professors. It is a recognized state affiliate of the NACDL. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and related disciplines. Its stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; educating the public on such issues; and promoting the exchange of ideas and research, including appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

SUMMARY OF ARGUMENT

In its decision below (*United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), the *en banc* Court of Appeals for the Second Circuit divided 7-4 on the constitutionality of 18 U.S.C. §1346, which provides that the term "scheme or artifice to defraud" in the federal criminal fraud statutes (18 U.S.C.§§1341, 1343, 1344, 1347, 1348) "includes a scheme or artifice to deprive another of the intangible right of honest services." As catalogued by the principal dissent below (*id.* at 155-65 (Jacobs, J.)), the division among the judges of the Second Circuit mirrors the kind of divisions and confusion that exists among the judges of virtually all circuits concerning the meaning, scope and constitutionality of §1346. The decision below demonstrates that the Court's standards for granting review (*see* Rules 10 (a) and (c) of the Rules of the Court) are fully satisfied, particularly since the judicial gloss required to render the statute comprehensible implicates important principles of federalism.

This case raises the equally or perhaps more important issue of the standard the federal courts should apply when determining the facial validity of a federal criminal statute outside the First Amendment context: the "no set of circumstances" standard articulated in *dicta* in *United States v. Salerno*, 481 U.S. 739, 745 (1987), the "permeated with vagueness" test articulated in *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999), or some other formulation. Since this Court is divided on that question, it is not surprising that the federal appellate

courts, including the Second Circuit, are similarly divided on the issue.

ARGUMENT

I.

This case raises an issue of federal law of exceptional importance on which several federal appellate courts are at least internally divided, if not divided between or among the circuits: the facial validity of 18 U.S.C. §1346. *See United States v. Rybicki*, 354 F.3d 124, 162-65 (2d Cir. 2003) (*en banc*) (Jacobs, J., dissenting) (cataloguing §1346 case law; "the vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge"). The sharply divided *en banc* decision of the court below — five opinions, none of which commanded a majority of the court — is a perfect example of the conflict and confusion that reigns among the judges of the federal appellate courts concerning the meaning, scope and constitutionality of 18 U.S.C. §1346. Nor is the conflict and confusion limited to the courts; it apparently pervades Congress as well. *United States v. Handakas*, 286 F.3d 92, 102-03, 105 (2d Cir. 2002) (describing the "uneven" development of the "honest services" doctrine in the courts, and the conflict between the Department of Justice and the House Subcommittee on the meaning of "honest services").

Moreover, determining the constitutionality and, if constitutional, the meaning of §1346 is particularly

important because the validity and interpretation of the statute directly implicates important questions of federalism. As noted by Judge Jacobs in his dissent below:

> [W]ithout any obvious limiting principles, the majority opinion invites federal prosecutors to police honesty in the corridors of state government by invoking section 1346 against state employees for their acts of "honest services" fraud. This construction of section 1346 undoubtedly "leaves it outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."

354 F.3d at 164-65 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

The judiciary's traditional deference to Congressional enactments should not deter this Court from considering the facial constitutionality of §1346 since it is fair to conclude from the uncertainty that prevails concerning the meaning of the statute that Congress disregarded this Court's firm warning "to speak more clearly" if it wanted to punish deprivations of "honest services" under the federal fraud statutes. *McNally*, 483 U.S. at 360. If this Court were to review the facial constitutionality of §1346, and strike it down as unconstitutionally vague, Congress could quickly and easily go back to the drawing board, as it did after

McNally, although this time Congress would surely be motivated to legislate more carefully.

Moreover, asking Congress to redraft the statute, and this time to "speak more clearly," is completely appropriate, indeed required, under the separation of powers doctrine. The plurality opinion reflects the view that the federal courts must "look to the [pre-*McNally*] case law" to determine whether the meaning of "honest services" is clear enough in the statute. 354 F.3d at 136-37. In other words, the court below would rely on the common law methodology of case-by-case adjudication to determine the meaning of the statute, even though there is no common law of crimes in this country. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting). As Judge Jacobs correctly noted in his dissenting opinion, "'[L]egislatures and not courts should define criminal activity.'" 354 F.3d at 164 (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).

Finally, if this Court did hold the statute facially unconstitutional, the lower federal courts could avoid their present unappealing fate, i.e., repeatedly being asked to decide "as-applied" challenges to §1346, like the one in this case.

In short, the facial constitutionality of §1346 is an important issue that satisfies this Court's standards for granting discretionary review. *See* Rule 10(a) and (c) of

the Rules of the Court. Certiorari should be granted to review that question.[2]

II.

While the facial constitutionality of §1346 is plainly an important, certiorari-worthy question, this case presents another, perhaps more important, question on which this Court itself is divided: what standard should apply in determining facial constitutional challenges outside the First Amendment context, whether "vagueness permeates the text" of the statute (*City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)), or whether "no set of circumstances exists under which the Act would be valid" (*United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)), or another formulation altogether?

The court below was hopelessly divided on this issue. The five-member plurality opinion left the issue open and undecided (354 F.3d at 131-32 & n.3), while opining that the facial validity of the statute would survive scrutiny under either the *Morales* or *Salerno* standard. One of the concurring opinions would have eschewed the facial constitutionality issue altogether because it was not

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2. The facial validity of §1346 is a particularly important argument in this case because a conviction based on a facially invalid statute is a "structural" defect that would trump the waiver problems noted in the opinions below. *See Neder v. United States*, 527 U.S. 1, 7-9 (1999) (cataloguing "structural" defect cases).

raised in the district court or before the panel. *Id.* at 147-48 (Katzmann, J., concurring). Another member of the court below concurred on the ground that *Salerno* was the prevailing standard for determining facial challenges, and §1346 satisfied that standard. *Id.* at 148-52 (Raggi, J., concurring). The four-member dissent would have applied the *Morales* standard, and would have held the statute facially unconstitutional on plain error grounds. *Id.* at 155 (Jacobs, J., dissenting).

As reflected in the opinions below, the standards governing facial challenges are still unsettled and in a state of flux. *See Lerman v. Board of Elections*, 232 F.3d 135, 144 n.10 (2d Cir. 2000) ("It is not even clear that *Salerno's* 'no set of circumstances' test articulates an exclusive standard for making facial challenges *outside* the First Amendment context") (original emphasis). The movement among the lower federal courts appears to be towards loosening the standards for facial challenges, so that a criminal statute that is pervasively vague, i.e., vague in many or most of its applications, is attackable on its face, even if a particular application could pass constitutional due process muster. *Id.* Indeed, the standard for facial challenges has never been as stringent in practice as generally believed, and this Court has upheld facial challenges that would not satisfy the "no set of circumstances" test. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application.") (citation omitted).

The most stringent standard for facial challenges derives from *dicta* in *United States v. Salerno*, where this Court upheld the constitutionality of the preventive detention provisions of the Bail Reform Act of 1984. The Supreme Court stated in *Salerno* that "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745.

In *City of Chicago v. Morales*, decided 12 years after *Salerno*, a plurality of this Court concluded that pervasive vagueness could render a criminal statute facially unconstitutional. There, this Court struck down on due process grounds a Chicago ordinance designed to control violent street gangs by permitting the police to arrest anyone reasonably believed to be a gang member (or in the company of a gang member) found loitering in a public place "with no apparent purpose" after having been ordered by the police to disperse. The *Morales* plurality expressly rejected *Salerno's* "no set of circumstances" *dicta*:

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, the

Court nevertheless entertained their facial challenge).

527 U.S. at 55 n.22 (citation omitted). Indeed, the *Morales* plurality found it "doubtful" that the *Salerno dicta* should ever apply. *Id.* In any event, the *Morales* plurality adopted a different and more easily satisfied standard for determining facial challenges: "When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55.[3]

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3. We recognize that the ordinance struck down in *Morales* was found to infringe on constitutionally protected liberty rights. 527 U.S. at 55. The plurality opinion in *Morales*, as well as the subsequent decisions from the circuit courts cited below, demonstrate that *Morales*'s test for facial challenges was not limited to the kinds of statutes at issue in cases like *Colautti v. Franklin*, 439 U.S. 379 (1979). Nor can §1346 be distinguished from the ordinance at issue in *Morales* based on the presence or absence of a *mens rea* requirement. While "a scienter requirement *may mitigate* a law's vagueness, especially with respect to the adequacy of the notice to the complainant that his conduct is proscribed" (*Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (emphasis added)), such a requirement does not eliminate the vagueness, particularly in a statute like §1346 in which the *mens rea* — intent to "deprive another of the intangible right of honest services" — is itself vague. In any event, a scienter requirement could not cure

(continued...)

Since *Morales*, a number of lower federal courts have questioned the vitality of the *Salerno* formulation. *See, e.g., Berkley v. United States*, 287 F.3d 1076, 1090 (Fed. Cir. 2002); *AMFAC Resorts, L.L.C. v. United States Department of the Interior*, 282 F.3d 818, 825-28 (D.C. Cir. 2002) (collecting cases); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329-30 (11th Cir. 2001); *Staley v. Jones*, 239 F.3d 769, 789-90 (6th Cir. 2001); *Lerman*, 232 F.3d at 144 n.10; *United States v. Frandsen*, 212 F.3d 1231, 1236 n.3 (11th Cir. 2000). *But see S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (despite noting inroads on *Salerno* formulation, including in abortion rights context, "we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so").

In addition to judicial economy served by avoiding endless "as applied" challenges to statutes like §1346, logic and policy recommend the *Morales* test over the *Salerno* formulation. If *Salerno* really had articulated the standard for facial challenges, such challenges would be rare indeed:

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3. (...continued)
§1346's failure to limit prosecutorial discretion, which is the "more important" of the two factors that the void for vagueness doctrine was designed to prevent or cure. *Handakas*, 286 F.3d at 107 (citing *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

> In an as-applied challenge, if the statute in question cannot be constitutionally applied to the litigant, then she will prevail without having to show that no set of circumstances exists under which the statute could be constitutionally applied to someone else. On the other hand, if the litigant loses her as-applied challenge, she will also lose her facial challenge under *Salerno* because the statute is constitutional in at least one circumstance. In short, a litigant can prevail on a facial challenge only if she can also prevail on an as-applied challenge, and even then she may lose the facial challenge. *Under Salerno, a litigant bringing a facial challenge rather than an as-applied challenge gains nothing.*

Dorf, "Facial Challenges to State and Federal Statutes," 46 Stan. L. Rev. 235, 239 (Jan. 1994) (emphasis added).

In short, *Salerno's* "draconian" standard (Dorf at 239) should not control the facial challenge to §1346 invited by this Court. If the *Morales* standard is used, as it should be, no one could doubt that "vagueness permeates the text" of the statute. Whatever standard applies, however, the issue is obviously one of great importance on which the lower federal courts and this Court are divided.

CONCLUSION

Win or lose, the issues presented by this case deserve plenary review by this Court. Petitioners' petition for certiorari should be granted.

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Respectfully submitted,

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